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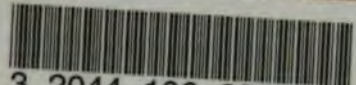
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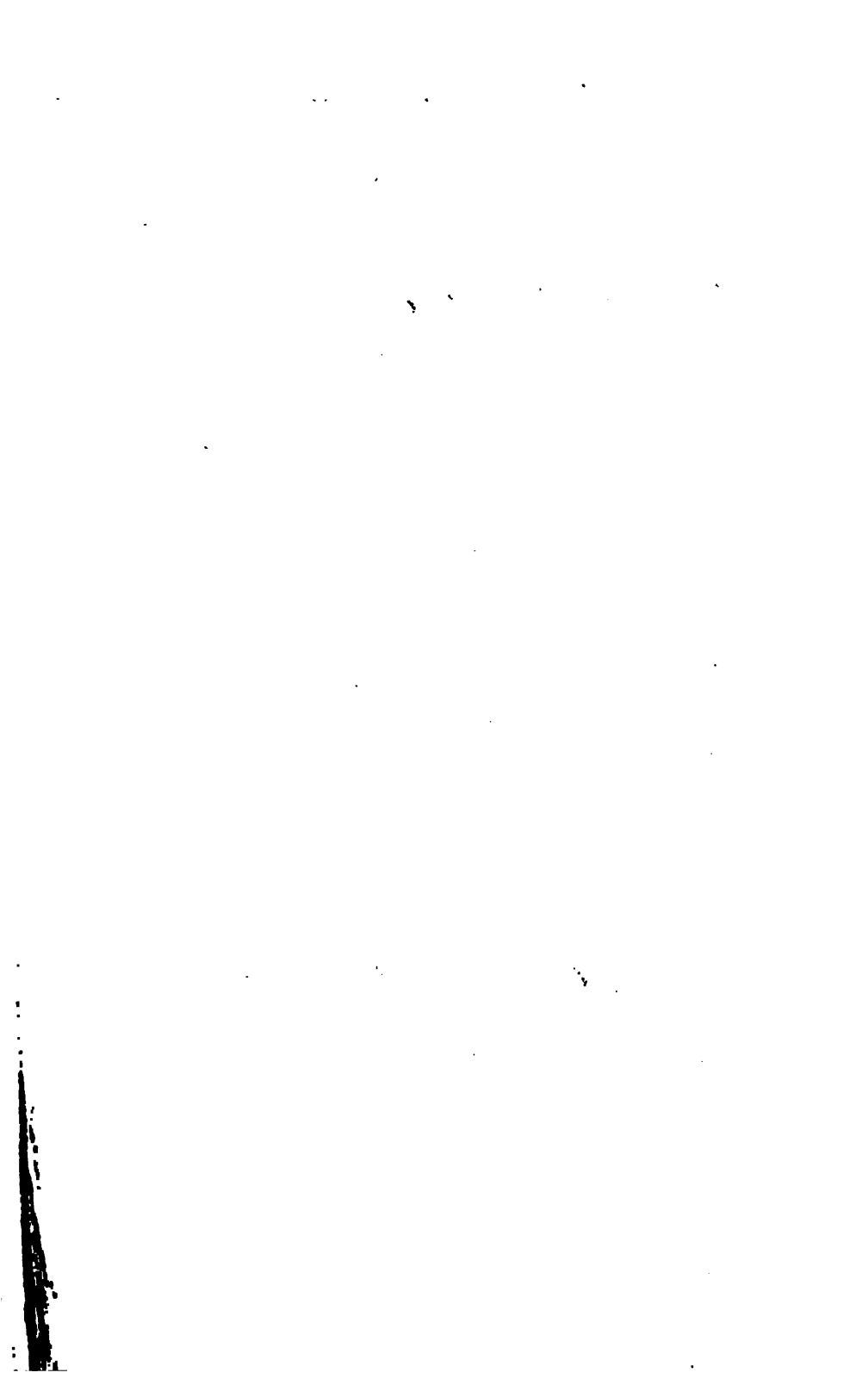
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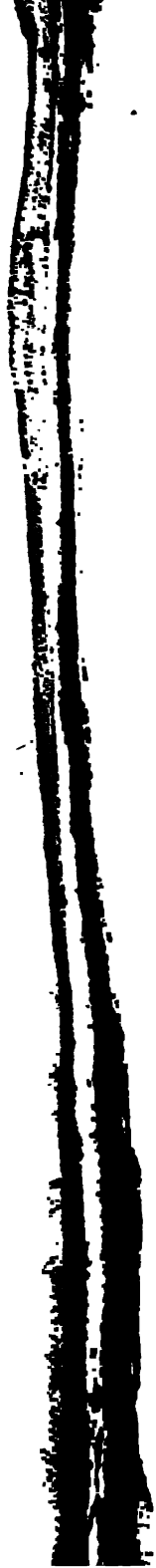
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THE ONTARIO WEEKLY REPORTER.

(1ST TO 11TH JANUARY, 1902, INCLUSIVE).

FALCONBRIDGE, C.J.

4TH JANUARY, 1902.

TRIAL.

DAVIS v. WALKER.

Donatio Mortis Causa—Solicitor—Lack of Independent Advice.

A practising solicitor, who had done any legal business which deceased had in her lifetime required to be done, was held not entitled to receive a *donatio mortis causa* from deceased, who had not had any independent advice with regard to it.

Walsh v. Studdart, 4 D. & War. at p. 171, applied and followed.

Action for a declaration that plaintiff is the owner of certain money evidenced and represented by certain bank books, a mortgage, and the title paper to about 20 acres of land, with an agreement of sale of the same representing the purchase price thereon, amounting in all to about \$1,500, as a *donatio mortis causa*, and to have the same delivered to him by defendant, who was married to Betsy Ann Walker, deceased, late of the township of Colchester North, in the county of Essex, and is the administrator of her estate. The families of the plaintiff and deceased had been fast friends for over forty years and continually visited each other, and on the evening of 27th February, 1901, deceased, being then seriously ill, came to plaintiff's house and made the gift. The plaintiff is a barrister and solicitor practising in Amherstberg, and transacted any legal business that deceased required.

The action was tried at Sandwich.

W. R. Riddell, K.C., for plaintiff.

E. S. Wigle, Windsor, for defendant.

FALCONBRIDGE, C.J.—The rule that delivery of a chattel is essential in order to constitute a valid *donatio mortis causa* is satisfied by an antecedent delivery of the chattel *alio intuitu* to the donee: Cain v. Moon, [1896] 2 Q. B. 283; Richer v. Voyer, L. R. 5 P. C. 461. So far as the

law is concerned the things said to have been given here were all valid subjects of *donatio mortis causa*: *Brown v. T. G. T. Corp.*, 32 O. R. 319. The three requirements of such a gift are here combined: *Cain v. Moon*, *supra*, per Lord Russell, C. J., at p. 286. There is sufficient corroboration in law and in fact of the statements of the plaintiff, whose evidence I accept, and who has, in my opinion, acted in entire good faith, but he is a solicitor and had done any legal business which the donor in her lifetime had to do, and was therefore her solicitor, and she acted without having any independent legal advice.

The principle which I consider applicable to this case appears to have been clearly laid down by Sir E. Sugden in *Walsh v. Studdart*, 4 D. & War. at p. 171; and he does not deal at all with the question of corroboration because he had already asked the question: "What proof is there that this conversation ever took place?" and then he lays down, at p. 171, the principle I have referred to, on the assumption that it did take place. See also *Thompson v. Heffernan*, 4 Dr. & War. 285, as to the rules laid down respecting such alleged gifts to a clergyman in attendance; and see also *Godard v. Carlile*, 9 Price 169; *Liles v. Terry*, [1895] 2 Q. B. 679. The action will be dismissed, and as the invalidity of the gift extends as well to the pieces of paper as to the moneys of which they are the *indicia*, the plaintiff will be ordered to deliver to the defendant all documents relating to the title to the property. No order as to costs.

Davis & Davis, Amherstburg, solicitors for plaintiff.

Fleming, Wigle & Rodd, Windsor, solicitors for defendant.

6TH JANUARY, 1902.

DIVISIONAL COURT.

Re THURESSON, MCKENZIE *v.* THURESSON.

Mortgage—Release of Part of Land with Right of Way—Effect of—Covenant—Right of Mortgagee to Recover upon after such Release—Further Evidence.

The release by a mortgagee, without the request of the mortgagor, of lot one, part of the mortgaged land, "together with a right of way for all purposes over lot A," said lot A extending along the rear of the other lots covered by the mortgage, as well as lot one, is such a dealing with the mortgaged property as prevents the mortgagee from recovering under the covenant for payment in the mortgage, because he cannot restore the property as originally mortgaged.

Leave was granted to the mortgagee to give in evidence a release of the right of way, so as to enable him to restore the property to the mortgagor as it was when mortgaged.

An appeal by S. M. Abercrombie, creditor of the estate of Eyre Thuresson, deceased, from an order of Neil McLean, Official Referee, sitting for the Master in Ordinary, disallowing her claim under a covenant contained in a mortgage. Eyre Thuresson in October, 1887, made the mortgage in question to one Clare to secure \$11,000, who therein agreed "to release and discharge at any time or times and without any notice or bonus, any portion or portions of the land having at least a frontage of 20 feet, upon payment by the mortgagors, their heirs, executors and administrators or assigns, at the rate of \$71 per foot frontage for the portions required to be released or discharged. The land was described as lots 1, 2, 3 and 4, and block A on the north-west corner of Queen and Sorauren Streets in the city of Toronto, "said lots and block A having a frontage of 157 feet 2 inches on Queen street, by a depth of 117 feet. The lots had that frontage on the north side of Queen street, and block A was a piece of land having a frontage of 10 feet on the west side of Sorauren Street and a depth of 157 feet 2 inches and adjoined the rear or north limits of the lots—in reality a lane 10 feet wide in their rear. The mortgage was made pursuant to the Short Forms Act. In December, 1888, Thuresson conveyed his equity of redemption to one Bryce, who covenanted to indemnify against the mortgage. In June, 1889, Bryce conveyed to one Hickson, who gave a similar covenant to indemnify his grantor. Hickson died in January, 1891, and in administration proceedings one McQuillan purchased, and had conveyed to him, a portion of the land described as "the easterly 40 feet from front to rear of lot number one on the north side of Queen street and west side of Sorauren avenue * * * having a frontage of 40 feet by a depth of 107 feet; together with the right of way for all purposes over lot A shewn on said plan." Lot A is block A. Clare executed a statutory partial discharge stating that Hickson's executors had satisfied \$2,200 of the mortgage money and describing the piece of land and right of way exactly as described in the conveyance to McQuillan. The appellant is the present holder of the mortgage made by Eyre Thuresson, and seeks, under the covenant in it, to prove against his estate for the balance remaining unpaid under the mortgage.

The appeal was argued on 12th December, 1901, before a Divisional Court, Falconbridge, C.J., and Street, J.

E. D. Armour, K.C., and R. U. McPherson, for the appellant.

J. D. Montgomery, for executors.

STREET, J.—The rule is that as soon as the mortgage money is fully paid, it is the duty of the mortgagee to restore the estate, and if by his dealing with the property, otherwise than with the consent of the mortgagor, he has put it out of his power to restore the estate, he cannot recover in an action upon the covenant: *Palmer v. Hendrie*, 27 Beav. 349; *Perry v. Barber*, 13 Ves. 198; *Gowland v. Garbutt*, 13 Gr. 578; *Munson v. Hauss*, 22 Gr. 279: but in such action the mortgagor may redeem: *Kinnaird v. Trollope*, 39 Ch. D. 636.

Reading the release clause with the description, the proper construction is that the mortgagee must release on payment of \$71 a foot on Queen street, the whole depth of the part released to the north limit of block A. The power of sale has not been exercised and therefore the mortgagee must be ready to restore on redemption the land covered by the mortgage, except any portion properly released. This she cannot do, for she has assented to the creation of a right of way over block A which cannot be restored except subject to that right. It is contended that the grant of the right of way does not affect in reality any part of block A excepting the part immediately to the north of lot one, the piece released, because there is no sufficient description of the purpose for which it is granted, no *ex quo nor ad quem*. It is not necessary to here determine the limits of the right. The grant of it was made by persons owning not only block A but portions of land adjoining it on the south; and the grant will be taken most strongly against the grantors. The mortgagee has no right to encumber the mortgagor's rights even by the creation of a cloud to remove which an expensive law suit may be necessary. It would have been quite different had the right of way been limited to the portion of block A immediately north of the portion of lot one released. It was in the granting of the right of way over the whole of block or lot A that the mortgagee exceeded his authority. Formerly the mortgagee could have recovered at law but would have been restrained in equity until in a position to reconvey: *Perry v. Barber*, *supra*; *Munson v. Hauss*, *supra*; *Forster v. Ivey*, 32 O. R. 175. The appellant asks leave to put in a release of the offending grant so far as it purports to give the right of way over any part of lot A, but that in rear of the 40 feet released, and the proper order to make is to dismiss the appeal with costs, but with a declaration that if within twenty days from the date of the

order the appellant brings into the Master's office evidence that she has put herself in a position to restore the estate so far as she is bound to do so under the terms of the mortgage, she be admitted to prove her claim. The question of *quantum* will of course then come to be considered, and the mortgagee will be charged with such a sum as would have entitled her to release the 40 feet, *i.e.*, with \$2,840. Against this she will be entitled to charge any disbursements properly made by Clare or herself in preserving the mortgaged property and allowable in such cases.

FALCONBRIDGE, C.J.—I concur. *Perry v. Barker, supra*, furnishes abundant authority for the declaration.

McPherson, Clark, Campbell & Jarvis, Toronto, solicitors for appellant.

Montgomery, Fleury & Montgomery, Toronto, solicitors for executors.

THE MASTER AT HAMILTON. 30TH DECEMBER, 1901.

FALCONBRIDGE, C.J. 7TH JANUARY, 1902.

HOLMAN v. TIMES PRINTING CO.

Special Jury—Notice of Striking—Time—Holiday.

Notice of striking a special jury under R. S. O. ch. 61, sec. 117, served on the 23rd December for the 28th December, is bad; Christmas Day is not to be reckoned in the four full days required: Rule 343.

Application on the part of the plaintiff for an order setting aside service of a certain notice served by defendants' solicitors upon plaintiff's solicitor on 23rd December, 1901, purporting to be in compliance with the provisions of R. S. O. ch. 61, sec. 117, and all proceedings taken thereunder subsequent to said notice, on the ground that the service of the said notice is insufficient and not a compliance with the requirements of the said section.

The facts appear in the judgment of the Master at Hamilton:—It appears from the affidavits and papers filed that the defendants on the 23rd day of December instant served a notice upon the plaintiff's solicitors, that they had sued out a *ven. fac. jurs.* in this action for the purpose of having a special jury struck herein, and that the sheriff of the county of Wentworth had appointed Saturday the 28th day of December instant, at half-past twelve p.m., for striking the said special jury.

Section 114 of ch. 61, R. S. O., enacts that any plaintiff or defendant in any case, excepting indictment for treason or felony, may in any such case triable by a jury have the

issues joined tried by a special jury upon suing out the necessary jury process for that purpose, and procuring such jury to be struck, etc.

Section 116 enacts that every sheriff upon the receipt of the writ shall, by a memorandum in writing upon the writ, appoint some convenient day and hour for striking such special jury, the day and hour so fixed being sufficiently distant to enable the party suing out the said venire to give the necessary notice to the opposite party.

And sec. 117 enacts that the party, his solicitor or agent, suing out the *ven. fac.* shall give notice in writing to the opposite party, his solicitor or agent, that he has sued out a *ven. fac.*, and of the day and hour appointed by the sheriff for striking the same, and the notice shall be served on the opposite party, his solicitor or agent, four full days before the day so appointed, etc.

Rule 343 provides that where a period of less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, holidays as defined by Interpretation Act shall not be reckoned in the computation of such period.

The notice referred to in sec. 117 was served upon the defendants' solicitors on the 23rd December inst., and notified them that the sheriff had appointed the following Saturday, the 28th inst., for the striking of the said jury.

The plaintiff urges that Christmas Day, a legal holiday, intervening between the 23rd and 28th insts., did not count, and there remained only three full days instead of four as required by the statute, and I do not think there can be any doubt as to the correctness of his argument.

The plaintiff's solicitors notified the sheriff and the defendants' solicitors that they would not attend upon the appointment, as the notice was insufficient; the sheriff proceeded, however, and in the presence of the defendants' solicitor drew a list of forty special jurors in accordance (as he alleges) with said Act.

In view of the foregoing facts, I find that the notice served upon the plaintiff's solicitors on the 23rd December inst., and all proceedings taken thereunder, should be set aside, and that the costs incidental to this application be costs to the plaintiff in any event.

The defendants by special leave appealed, and the appeal was argued before FALCONBRIDGE, C.J., at Hamilton.

P. D. Crerar, Hamilton, for defendants. Rule 343 only applies to days fixed by the Rules, and does not extend to a period of time fixed by an Act of the Legislature.

D'Arcy Tate, Hamilton, for plaintiff. Section 127 of the Judicature Act constitutes a council of the Judges to consider

procedure and the administration of law in the High Court of Justice, and sec. 129 of that Act makes the Rules of Practice prescribed by the said council of the same force as if contained in an Act of the Legislature, and therefore Rule 343 governs where a period of less than six days appointed or allowed for doing any Act or taking any proceeding, and holidays, as defined by the Interpretation Act, must not be reckoned in the computation of such period. Striking a special jury is an act or proceeding within the meaning of the Rule, and therefore Christmas Day must be excluded.

FALCONBRIDGE, C.J., affirmed the order of the Master and dismissed the appeal with costs to the plaintiff in any event of the cause, reserving leave to defendant to appeal, if so advised, to a Divisional Court.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

Crerar & Crerar, Hamilton, solicitors for defendants.

MEREDITH, C.J.

JANUARY 2ND, 1902.

CHAMBERS.

Re CURRIE.

Infant—Will—Advancement on Account of Legacy Payable at Majority—Executor.

Application on behalf of an infant twenty years of age for the approval of the court of the payment to her by the executor of the will of Kate Williamson, deceased, of \$200 on account of a legacy of \$1,500, payable to the infant with accrued interest when she attains majority. It was shewn that the executor and official guardian approved of the advance, and that the infant needed the money to pursue her studies in elocution.

F. W. Harcourt appeared for all parties.

MEREDITH, C.J.—I make the order in this case on the authority of *Re Wilson*, 14 P. R. 261, and I refer also to *Re Coutts*, 15 P. R. 162. The order must disclose on its face the consent of the executor, and that he admits that he has sufficient funds in his hands to meet the legacy when payable.

McCarthy, Osler, Hoskin, & Creelman, Toronto, solicitors.

JANUARY 7TH, 1902.

DIVISIONAL COURT.

HISLOP v. JOSS.

Appeal—Setting down—Christmas Vacation—Time of—Rules 790 (1), 352 (2).

The setting down of an appeal to a Divisional Court

under Rule 788 (2) is not "doing an act or taking a proceeding in appealing to a Divisional Court" within Rule 352 (e).

Motion to stay a taxation of costs as of an abandoned motion under Rule 790, or for an order confirming the setting down of the appeal. The judgment, at the trial without a jury, was granted on 13th November, 1901, and defendant Lyon served notice of appeal therefrom on 25th November. The plaintiff served notice of appeal on the 16th December, and set his appeal down on 20th December. On 24th December the defendant Lyon's appeal not having been set down, the plaintiff obtained under the following Rule: "790 (1).—Unless otherwise ordered, if a party who serves a notice of motion does not set the motion down, he shall be deemed to have abandoned the same, and the opposite party shall thereupon be entitled without an order to the costs of the motion"—an appointment for 26th December to tax the costs. On the 26th December the appeal of defendant Lyon was set down, and on the same day MacMahon, J., made an order, with costs to plaintiff in any event, staying the taxation until the first sittings of a Divisional Court to enable defendant Lyon to apply to it for relief, and accordingly this motion was made on 7th January, before a Divisional Court, Meredith, C.J., and Britton, J.

A. Mills, for defendant Lyon.

T. Hislop, for plaintiff.

The judgment of the Court was delivered at the close of the argument.

MEREDITH, C.J.—The practice has been for a long time to set down appeals in Christmas vacation, and as the matter is not *res integra*, it is better not to disturb a practice that is well settled. Costs throughout should be in the action.

BRITTON, J.—I concur.

T. Hislop, Toronto, solicitor for plaintiff.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for defendant Lyon.

JANUARY 2ND, 1902.

DIVISIONAL COURT.

TRUSTEES OF CARLETON PLACE METHODIST
CHURCH v. KEYES.

Methodist Church—Trustees of, Have no Right to Allot Pews unless for a Money Consideration or Rent—But may Punish under Criminal Code any person disturbing the service in the Church—47 Vict. ch. 88 (O.), schedule B.—47 Vict. ch. 106 (D.), schedule B.—Sec. 173, Crim. Code.

Appeal by defendant from judgment of County Court of

Lanark in favour of plaintiff in action in that Court for a declaration of the right of the plaintiff Young to the enjoyment of pew number 64 in the Carleton Place Methodist Church, and for an order restraining defendant from interfering with the plaintiff's control and enjoyment of the said pew, and for damages against defendant.

J. J. Maclaren, K.C., for defendant.

J. A. Allan, Perth, for plaintiffs.

The judgment of the Court was delivered by STREET, J.—The church is vested in the trustees, plaintiffs, by 47 Vict. ch. 88 (O.) and 47 Vict. ch. 106 (D.) upon the trusts set forth in schedule B. to each Act, and under paragraphs 2 and 7 of the schedule, the trustees have no power to do as they have done here, viz., allot pews or seats to particular members, unless they rent to them for a money consideration, and not having done so all the seats are free, subject to regulation during service as to seating, and to prevent disorder and overcrowding: *Asher v. Calcroft*, 18 Q. B. D. 607; and any person wilfully disturbing the service in the church may be punished under sec. 173 of the Crim. Code. In this case both the plaintiff Young and defendant claim exclusive rights to the pew. The squabble is not a creditable one to either of them, but it seem to have been aggravated by the uncompromising position taken by defendant. Though there is a general power in the officers of any place of public worship to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during service: *Asher v. Calcroft*, *supra*; *Reynolds v. Monkton*, 2 Moq. & R. 384; that is not the right claimed here. The action must be dismissed without costs, and the appeal allowed with costs.

J. A. Allan, Perth, solicitor for plaintiffs.

Lavell, Farrell, & Lavell, Smith's Falls, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 2ND, 1902.

TRIAL.

THORNDYKE v. THORNDYKE.

Gift—Parent and Child—Bounty not Bargain—Undue Influence—Mental Competence.

Action by Joseph Thorndyke, the executor and son of Elizabeth Thorndyke, deceased, to have a discharge of mortgage executed by her in favour of her son William, the defendant, set aside and its registration vacated, and for a declaration that the mortgage securing \$2,400 is still in full force, and for its payment.

G. H. Watson, K.C., and R. Ruddy, Millbrook, for plaintiff.

A. B. Aylesworth, K.C., and J. J. Maclellan, for defendant.

FALCONBRIDGE, C.J.—The features of this case distinguish it from my decision in the case of *Fisher v. Fisher*, noted in the *Globe and Mail* and *Empire* newspapers of February 19th, 1901, and cases therein cited. Here there was no sign of coercion, and Mr. White, who had performed some casual legal services for deceased, though hardly to be called her solicitor, testified, as did also Miss Good, that Mrs. Thorn-dyke gave her instructions clearly, and knew what she was doing, and refused to take a bond from the defendant for her maintenance, saying that she could trust William. The deceased had, in 1897, remitted the interest then due, and there is abundant evidence that for years she had intended to give this mortgage to William. The transaction is to be looked upon as bounty and not bargain, and is one that deserves to be upheld. I dismiss the action, but without costs.

R. Ruddy, Millbrook, solicitor for plaintiff.

Robertson & Maclellan, Toronto, solicitors for defendant.

LOUNT, J.

JANUARY 2ND, 1902.

CHAMBERS.

CHEVALIER v. ROSS.

Amendment—Pleading—Diligence in Moving—Rule 312.

Appeal by plaintiff from order of local Master at Cornwall refusing leave to plaintiff to amend the statement of claim by increasing the amount claimed for extras in paragraph 3 by \$79.33, making \$199.90, instead of \$120.57, and to amend the reply by inserting the words "does not" before the word "accepts," and striking out the "s" from that word.

J. H. Moss, for the plaintiff.

I. F. Hellmuth, for defendants.

LOUNT, J.—The plaintiff clearly made a mistake in not claiming the larger amount, and has used reasonable diligence in moving to amend after discovering his error, nor will defendant be injured by allowing the amendment. This is a case to which Rule 312 applies with full force: see *Cropper v. Smith*, 26 Ch. D. at p. 710; *Williams v. Leonard*, 16 P. R. 544, 17 P. R. 73; *Emery v. Webster*, 9 Ex. 242.

I allow the appeal, but without interfering with the disposition of costs by the Master, and give leave to plaintiff to amend as he may be advised. The defendant may withdraw

the money paid into Court, and may also plead as advised, and plaintiff may then reply. Costs of appeal to be in the action.

Gogo & Stiles, Cornwall, solicitors for plaintiff.

Leitch, Pringle, & Cameron, Cornwall, solicitors for defendant.

JANUARY 3RD, 1902.

DIVISIONAL COURT.

JONES v. BISSONETTE.

Writ of Summons—Order for Leave to Issue for Service out of Jurisdiction—Will be Granted in a Proper Case and will Fix Time for Appearance—Rules 120, 128, 162 (g), 164—Separate Causes of Action—Joinder of.

Motion by plaintiff for order permitting issue of a writ of summons for service out of the jurisdiction. The plaintiff carries on business in Toronto, manufacturing a preparation for bronchial affections, called Carbo-Crea, and sells a vaporizer. He was arrested in Toronto by defendant Bissonette on a warrant issued in Montreal on the information of defendant Benedict, charging him with forging a testimonial respecting Carbo-Crea, hand-cuffed in spite of his protest, and taken to Montreal, where he was subsequently tried before a jury and acquitted. The defendant Bissonette is High Constable of Montreal. The defendant Benedict is the manager of the firm of Leeming, Miles, & Co., who are agents for a Vapo-Cresoline Co. The defendant Gibbons is the agent in Ontario of Leeming, Miles, & Co. The action is for malicious prosecution and false arrest, and plaintiff charges conspiracy by the defendants Benedict, Miles, and Gibbons to prevent his manufacturing his preparation, resulting in the laying of the information, the arrest, the hand-cuffing, and trial in Montreaal. The Master in Chambers referred the motion to a Judge in Chambers, and upon its coming before Boyd, C., he referred it, on account of his decision in *Oigny v. Beauchemin*, 16 P. R. 508, to a Divisional Court.

W. R. Riddell, K.C., for plaintiff.

The judgment of the Court (STREET and BRITTON, JJ.) was reserved, and subsequently delivered by STREET, J.—The proper practice under the Rules as they now stand is to obtain an order fixing the time for appearance in a writ proposed to be issued, and allowing it to be served outside the jurisdiction before the writ is issued. Reasoning from the terms of Rules 120, 128, and 164, it is evident that before the writ referred to can be issued it is necessary to obtain an order limiting the time for appearance, which order must also give leave to serve the

writ out of the jurisdiction. Upon the merits disclosed the other defendants are not responsible, for the only act complained of against Bissonette was in executing the warrant of arrest, viz., hand-cuffing: *Hamilton v. Massie*, 18 O. R. 585. The plaintiff sets up two separate causes of action, and he cannot join them in one action: *Gower v. Couldridge*, [1898] 1 Q. B. 348; *Smurthwaite v. Hannay*, [1894] A. C. 494; *Mooney v. Joyce* and *Faulds v. Faulds*, 17 P. R. 244 and 480. But the plaintiff is entitled to an order as to the defendants Benedict and Miles, joining with them defendant Gibbons, who is within the jurisdiction, and who is charged as one of the persons who caused the laying of the information, and he is a proper party to the action, and that justifies an order for the issue of a writ and its service out of the jurisdiction under Rule 162 (g): *Croft v. King*, [1893] 1 Q. B. 419. If plaintiff fails in the action as to Gibbons, then his only justification for having brought it will be shown to have had no existence, and the order to be issued should contain a condition that in case the action be dismissed as to Gibbons the plaintiff will consent to its dismissal as against the other two defendants.

Beatty, Blackstock, Nesbitt, Chadwick, and Riddell, solicitors for the plaintiff.

MASTER IN CHAMBERS.
MEREDITH, C.J.

JANUARY 3RD, 1902.

CHAMBERS.

TAWSE v. SEGUIN.

Particulars—Further Particulars—Interpleader Issue.

Appeal by defendants from order of Master in Chambers requiring them to furnish to plaintiff particulars which were directed to be furnished by two previous orders.

The particulars ordered were in relation to the amounts alleged by the defendants to have been advanced to the deceased.

R. C. Clute, K.C., for defendants.

Gideon Grant, for plaintiff.

MEREDITH, C.J.—Held, that the particulars furnished prior to the order appealed against were not such particulars as the defendants by the two previous orders, or by either of them, had been required to furnish, and therefore the order was right, but it should be varied so as to point out more exactly what it is that the defendants have not done which they ought to have done. Costs to plaintiff in any event.

Dods & Grant, Toronto, solicitors for plaintiff.

Clute, Macdonald, MacIntosh, & Hay, Toronto, solicitors for defendants.

BRITTON, J.

JANUARY 3RD, 1902.

TRIAL.

BLANQUIST v. HOGAN.

Master and Servant—Negligence—Voluntarily Continuing in Dangerous Employment.

Action tried at Port Arthur, brought to recover damages for negligence.

F. H. Keefer, Port Arthur, for plaintiff.

N. W. Rowell, for defendant.

The facts appear in the judgment.

BRITTON, J.—The plaintiff is a miner employed by defendants, and was injured by the premature explosion of dynamite placed in a hole drilled by plaintiff. It was alleged that defendant was (1) personally negligent in not thawing the dynamite, and (2) that he caused drills to be made smaller than those heretofore in use and too small for the cartridges being used. The plaintiff had lost to a great extent the use of his left arm and hand. A nonsuit was refused at the close of the plaintiff's case. The jury found in answer to eight questions submitted that defendant undertook to thaw the dynamite, that he was negligent in not knowing the exact size of the dynamite provided, that plaintiff knew the dynamite was partly frozen and dangerous, and he knew the dangerous character of the work, and voluntarily undertook it, but could not by the exercise of reasonable care have avoided the accident, and in answer to the fifth question that the smaller drills as used were sufficient for the use of one inch sticks of dynamite.

I do not think that there was any evidence of negligence of defendant to go to the jury. The plaintiff knew his danger, had the means of avoiding it, but voluntarily continued: *Woodley v. Metropolitan D. R. W. Co.*, 2 Ex. D. 384; *Thrusel v. Handyside*, 20 Q. B. D. 359. The second branch of the case is disposed of by the answer to the fifth question. There is no evidence of use of any other than one inch sticks, and the drills used were one and five-sixteenth inch bit. I dismiss the action, but do not give costs because the plaintiff did not ask for them.

Frank H. Keefer, Port Arthur, solicitor for plaintiff.

W. F. Langworthy, Port Arthur, solicitor for defendant.

JANUARY 6TH, 1902.

DIVISIONAL COURT.

RE GEDDES AND COCHRANE.

Landlord and Tenant—Renewal of Lease—Covenant—Construction of—Increased Rent—Average for Renewal Term.

Motion by the landlord for the opinion of the Court upon

a special case stated under the Arbitration Act, R. S. O. ch. 62, sec. 9, as to the construction of a renewal clause in a lease for 21 years from January 1st, 1880, at a rent of \$106 for first year, \$130 for the next four years, \$145 for next five years, and \$178 for next 11 years. The renewal was to be at an increased rent to be settled by arbitration, "payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents."

H. D. Gamble, for the landlord.

John MacGregor, for tenant.

The Court held that the arbitrators are bound to award

The Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) held, approving *In re Geddes and Garde*, 32 O. R. 262, that the arbitrators are bound to award an increased rent, which may be a nominal increase, if they think proper, but it must be based not on the amount of rent for the last eleven years, but on the rent reserved for the whole term. That the arbitrators might make the increase either upon each year's rent or upon the average of the whole 21 years, but so that in the result the average annual rent is greater for the future term than for the past. No order as to the costs was made because upon the case submitted the Court had nothing to do with costs.

C. & H. D. Gamble, Toronto, solicitors for landlord.

John MacGregor, Toronto, solicitor for tenant.

FALCONBRIDGE, C.J.

JANUARY 6TH, 1902.

TRIAL.

BOWERMAN v. TOWN OF AMHERSTBURG.

Municipal Corporation—Power to Permit Laying of Gas Pipes under Streets—Private as well as Public Purpose of their Use does not Affect—By-Law—Valid if Signed by Presiding Officer Appointed by the Council in Absence of Mayor, under R. S. O. ch. 223, sec. 272—R. S. O. ch. 223, sec. 566 (3) as amended by 62 Vict. (O.) ch. 23, article (a 8)—I Edw. VII. ch. 26, sec. 24.

Action tried at Sandwich, brought by plaintiff on behalf of himself and other ratepayers, and the Attorney-General for Ontario, to have declared invalid a resolution of the council of the corporation, subsequently confirmed by by-law, allowing defendant Fraser to lay metal pipes under the surface of certain streets for the purpose of conveying acetylene gas to his neighbours, to restrain defendants from laying the pipes, and for a mandamus to defendant Fraser to restore the streets to their former state of repair.

A. H. Clarke, Windsor, for plaintiff.

D. R. Davis, Amherstburg, and F. H. A. Davis, Amherstburg, for corporation.

J. H. Rodd, Windsor, for defendant Fraser.

FALCONBRIDGE, C.J.—The council had power under the Municipal Act, sec. 566 (3), as amended by 62 Vict. (O.) sec. 23, article (a8), to authorize defendant Fraser to lay the pipes, notwithstanding 1 Edw. VII. ch. 26, sec. 24. The defendant Fraser is not supplying light for his own purposes only, but for municipal and public purposes of the municipality, and the public see fit to avail themselves, so far as the streets in question are concerned. The by-law passed pending the action and confirming the resolution is valid, though not signed by the mayor: R. S. O. ch. 223, sec. 272: but the presiding officer, who had power to sign. Action dismissed without costs between plaintiff and defendants or between defendants.

Franklin A. Hough, Amherstburg, solicitor for plaintiff.

Davis & Davis, Amherstburg, solicitors for defendants corporation of Amherstburg.

Henry Clay, Amherstburg, solicitor for defendant Fraser.

FALCONBRIDGE, C.J.

JANUARY 7TH, 1902.

TRIAL.

FITZGERALD v. FITZGERALD.

Dower—Equity of Redemption—Fraudulent Conveyance by Husband to Defeat, Valid.

J. W. F. seized in fee of certain land mortgaged it. Afterwards the plaintiff married him, he promising, as an inducement to marriage, to leave her the land. Subsequently he conveyed the land, subject to the mortgage, to a son by his first wife, and died. The son was aware of his father's promise to plaintiff, and the intent to defeat her claim.

Held, nevertheless, that the plaintiff was not entitled to dower.

Finlay v. Chirney, 20 Q. B. D. at p. 498, *Re Luckhardt*, 29 O. R. 111, referred to.

A. B. Aylesworth, K.C., and J. W. Bennet, Peterborough, for plaintiff.

G. H. Watson, K.C., and E. B. Edwards, K.C., for defendant.

Action to have the above mentioned conveyance set aside was tried at Peterborough and dismissed without costs.

Roger & Bennet, Peterborough, solicitors for plaintiff.

E. B. Edwards, Peterborough, solicitor for defendant.

LOUNT, J.

JANUARY 7TH, 1902.

WEEKLY COURT.

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC
R. W. CO.

Highway—Made by Crown Surveyor becomes Road within both Municipal and Dominion Railway Act—By-law not Necessary to Enable Municipality to Exercise its Jurisdiction over—Direction to their Overseer Sufficient—Right of Railway to Cross Highway and Put Fence Across under sec. 90 (g) of Railway Act (D.) is Governed by secs. 183 and 194; and in Crossing must not Obstruct—Railway Committee has no Power to Deal with this Case, and the Court has—Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, and City of Toronto v. Lorsch, 24 O. R. 227, followed.

Special case heard at Ottawa. Action for an injunction to restrain defendants from obstructing the highway between the 5th and 6th concessions of the township of Gloucester, with fences, on either side of the tracks of defendants where they cross the highway, and for a mandatory order compelling the removal of the fences.

G. F. Henderson, Ottawa, for plaintiffs.

F. H. Chrysler, K.C., and C. J. R. Bethune, Ottawa, for defendants.

It was contended for defendants (1) that the highway in question, being a highway in law and not in fact—that is, an open public road used and travelled upon by the public—it is not a highway within the meaning of the Railway Act, 51 Vict. ch. 29 (D.) (2) that, as the road allowance where the fences cross, and for a mile on either side along the road allowance, has not been cleared and opened up for public travel and has not been used for a public road, it is necessary that the municipality should first pass a by-law opening it before the municipality can exercise any jurisdiction over it; (3) that under sec. 90 (g) of the Railway Act they had the right to construct their tracks and build their fences across the highway; (4) that the only tribunal having jurisdiction to deal with the questions in dispute is the Railway Committee of the Privy Council.

LOUNT, J., held as to contention (1), that the allowance for the road in question having been made by a Crown surveyor, it is a highway within the meaning of sec. 599 of the Municipal Act, and also within the meaning of the Railway Act; as to (2) that a by-law is not necessary; the council may direct the overseer or pathmaster to open the road, and such direction would be sufficient; as to (3) that this right is subject to sec. 183, which provides against any obstruction to the highway, and sec. 194, which provides for fences and

cattle-guards being erected and maintained; therefore defendants have no right to maintain fences which obstruct the highway; as to (4) that the question in dispute is not as to the construction of the railway along and across the highway within the meaning of sec. 11 (h) of the Railway Act; the railway committee have no jurisdiction, and this Court had jurisdiction: *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; *City of Toronto v. Lorsch*, 24 O. R. 227.

Judgment for the plaintiffs for the relief asked with costs.

MacCraken, Henderson, & McDougall, Ottawa, solicitors for plaintiffs.

Chrysler & Bethune, solicitors for defendants.

ROBERTSON, J.

JANUARY 7TH, 1902.

TRIAL.

McDERMOTT v. HICKLING.

Mistake—Money Overpaid on Mortgage—Ignorance of Facts—Executor—Costs against, if Estate Insufficient.

Marriott v. Hampton, 2 Smith's Leading Cases, 10th ed. 431, followed.

Action tried at Barrie, brought to recover money overpaid on a mortgage and interest thereon since 23rd February, 1901.

H. H. Strathy, K.C., and C. W. Plaxton, Barrie, for plaintiff.

W. A. Boys, Barrie, for defendant G. W. L. Hicking.

H. D. Stewart, Barrie, for both defendants as trustees.

ROBERTSON, J., after a lengthy review of all the facts:—The case is within the third proposition which is deduced from the law as it now stands, and put in the notes to *Marriott v. Hampton*, 2 Smith's Leading Cases, 10th ed., p. 431, that money paid in ignorance of the facts is recoverable, notwithstanding laches, providing that the party paying it has not waived all inquiry. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back. Judgment for plaintiff for \$306.88 and interest from 23rd February, 1901, against defendants as executors, who may have a reference if they desire. Costs of action and reference to plaintiff. If not sufficient estate in defendants' hands, costs on High Court scale to be paid *de bonis propriis*, but to be limited to such

as would be recoverable had plaintiff commenced the action originally against both defendants, and charged them as surviving executors. If defendant G. W. L. Hickling set up new matter after order allowing plaintiff to amend by adding C. M. Hickling, the defendant G. L. Hickling should be allowed the costs of the original statement of defence.

C. W. Plaxton, Barrie, solicitor for plaintiff.

McCarthy, Boys, & Murchison, Barrie, solicitors for defendant G. W. L. Hickling.

Stewart & Stewart, Barrie, solicitors for defendants as trustees.

ROBERTSON, J.

JANUARY 7TH, 1902.

TRIAL.

ONTARIO BANK v. POOLE.

Promissory Note—Want of Consideration—Effect of—Bank—Receipt of Note for Specific Purpose—Notice—Effect of—"Holder in due Course"—"Negotiate"—Bills of Exchange Act, 1890, sec. 29.

Watson v. Russell, 3 B. & S. 24, distinguished; Lewis v. Clay, 67 L. J. N. S. at p. 227, approved.

Action to recover amount of a promissory note made by defendant in favour of plaintiffs for \$1,500, dated 30th March, 1901, and payable three months after date. The defendant alleged that the note in question was made by him as an individual shareholder in the Consolidated Pulp and Paper Co. for the purpose of obtaining from plaintiffs an advance of money for the company, of which the plaintiffs were aware, and received it from one Edwards with that notice, but have never made the advance. On 3rd May, 1901, defendant wrote plaintiffs demanding back the note, having learned for the first time that it was held and used for other purposes by them.

J. H. Moss and C. A. Moss, for plaintiffs.

E. D. Armour, K.C., and F. E. Hodgins, for defendant.

ROBERTSON, J.:—Watson v. Russell, 3 B. & S. 34, is distinguishable because here no consideration was given by plaintiffs, who refused to discount for the benefit of the company in the manner and for the purpose for which defendant had signed it. No property in the note passed, and plaintiffs could not apply it as collateral to an advance long before made, for which the maker was in no way liable. The plaintiffs are, therefore, not holders for value, and it is not necessary to show notice. The note was never negotiated, and the bank, moreover, is not "a holder in due course," in the sense required by sec. 29 of Bills of Exchange Act, 1890:

Lewis v. Clay, 67 L. J. N. S. at p. 227, per Lord Russell. On the whole case I do not think is necessary to decide whether the plaintiffs were put on inquiry as to the condition on which the note was handed over, as the case turns on the point that there was no value given, or, in other words, that the plaintiffs hold it without consideration and for a purpose other than defendant intended when he signed it. Action is dismissed with costs.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for plaintiffs.

McMurrich, Hodgins, & McMurrich, Toronto, solicitors for defendant.

JANUARY 7TH, 1902.

DIVISIONAL COURT.

GIRARDOT v. CURRY.

Deed—Reformation of—Mistake.

Appeal by plaintiff from judgment of County Court of Essex in action to reform or rescind an assignment of certain moneys, under the following circumstances:—Prior to November, 1900, plaintiff owned certain land and had made an agreement with McKee, allowing him to remove gravel on payment of \$1,500 upon certain terms. Plaintiff sold the land in November, 1900, to one B., who resold to defendants, to whom plaintiff conveyed. Plaintiff, also, assigned, as they supposed, at defendants' request, the money to become due to plaintiff by McKee under his agreement. By mistake, however, plaintiff alleged, the assignment included principal money, \$109, and interest, \$58.42, accrued due.

F. A. Anglin, for appellant.

R. F. Sutherland, K.C., for defendants.

Judgment of the Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) was delivered by STREET, J., dismissing the appeal, and holding that, as it was shewn in evidence that the defendants purchased on the faith of their vendor's statement that \$1,195 was due under the contract with McKee, defendants were entitled to that sum, but that certain sums amounting to \$62 were due from McKee in addition to the \$1,195, and therefore the plaintiff was entitled to it, and the appeal should be dismissed with costs, but the order should contain a declaration that defendants must account and pay over to plaintiff, out of the first moneys they collect from McKee, the sum of \$62, with interest from November 9th, 1901.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Cleary & Sutherland, Windsor, solicitors for defendants.

JANUARY 8TH, 1902.

DIVISIONAL COURT.
LEISHMAN v. GARLAND.

*Appeal—From County Court—To Divisional Court—R. S. O. ch. 55,
sec. 51, sub-secs. 1, 2, 3, 5.*

After judgment for plaintiff in an action in a County Court, tried without a jury, a motion was made in term to set aside the judgment and enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such further order as might be just: Held, plaintiff was entitled to appeal to a Divisional Court from an order made on the motion setting aside the judgment and directing a new trial.

Appeal by plaintiff from order of the Judge of the County Court of York setting aside the judgment of the junior Judge in favour of plaintiff, and directing a new trial of action for damages for wrongful dismissal, and to recover a balance of amount due for commission on sales of goods and salary under the agreement between the parties, and of the counterclaim. The motion to the senior Judge was to enter judgment for defendants upon the claim and counterclaim, or in the alternative for a new trial, or for such other order as might be just.

B. N. Davis, for plaintiff.

W. R. Riddell, K.C., for defendants, objected that an appeal did not lie.

After argument on the objection, the case was heard on the merits, and the judgment of the Court, MEREDITH, C.J., and BRITTON, J., which was reserved, was subsequently delivered by

MEREDITH, C.J.—The motion falls within R. S. O. ch. 55, sec. 51, sub-sec. 2. It was to set aside the judgment and enter judgment for defendants, and none the less was it so because a new trial was asked in the alternative, and by sub-sec. 5 an appeal lies to the High Court. If the Legislature had intended otherwise, sub-sec. 4 would have been made applicable to all cases instead of to jury cases alone. It is not clear that sub-sec. 3 applies to a motion for a new trial, where the ground on which the party moves is that, upon the whole case, it is one in which in its discretion the Court should direct a new trial, and that it is not to be taken to be confined to cases where the ground is something *ejusdem generis* with that mentioned in the sub-section—the discovery of new evidence. The scheme of the section appears to be this:—There is to be an appeal at the option of the unsuccessful party, both in jury and non-jury cases, either

to a Divisional Court, or to the County Court, except that in jury cases if a new trial is moved for, either alone or combined with or as an alternative for any other relief, the motion must be made to the County Court, and no further appeal is given to either party. A motion for a new trial, on the ground of discovery of new evidence or the like, must be made, both in jury and non-jury cases, to the County Court, and no further appeal is given to either party.

Where a party having the right to appeal, either to a Divisional Court, or to the County Court, elects to appeal to the latter Court, he has no further right of appeal, but the opposite party has the right to appeal to the High Court. Sub-secs. 1, 2, and 5 govern the present case, and not sub-sec. 3. *Brown v. Carpenter*, 27 O. R. 412, *Irvine v. Sparks*, 31 O. R. 603, do not assist the respondent. The objection therefore fails. On the merits . . . the order below is reversed and the judgment restored with costs here and below to plaintiff.

Davis, Cook, & Smith, Toronto, solicitors for plaintiff.

R. C. LeVesconte, Toronto, solicitor for defendants.

MEREDITH, C.J.
LOUNT, J.

JANUARY 8TH, 1902.

DIVISIONAL COURT.

MCGUINNESS v. MCGUINNESS.

Creditors' Relief Act—Different Creditors' Executions—Sale of Land under Second Execution within One Year—Costs—Advertisement is Seizure, and Second Creditor Entitled to his Costs.

Appeal by E. G. Porter, first execution creditor of plaintiff, from order of Judge of County Court of Hastings, setting aside the sheriff's scheme for distribution of proceeds of sale of land under execution, and directing that the costs of the defendant in this action, the second execution creditor, should, under R. S. O. ch. 78, sec. 26, be paid first out of the proceeds, because the lands were sold under the second writ. Both writs being in the sheriff's hands, the second execution creditor, before the expiry of a year, directed the sheriff to sell, and he accordingly proceeded to advertise the lands for sale, and sold after the year.

W. H. Wallbridge, for appellant.

H. L. Drayton, for respondent.

Judgment of the Court was delivered by MEREDITH, C.J.—The advertisement was in law the seizure of the lands under the second writ, and the sale was also under it, and there was no seizure nor sale under the first writ. The case

is within the very words of sec. 26. Appeal dismissed with costs.

E. G. Porter, Belleville, the first execution creditor in person.

J. English, Napanee, solicitor for second execution creditor.

MEREDITH, C.J.

JANUARY 8TH, 1902.

CHAMBERS.

WARD v. BENSON.

Parties—In Same Interest—A Solicitor will not be Appointed to Represent Defendants, not Parties, as there is not Authority to do so under Rule 200.

That Rule provides for the authorizing of one or more parties to defend on behalf or for the benefit of all parties not already defendants, where there are numerous parties having the same interest, so as to dispense with the necessity of making them defendants.

Bedford v. Ellis, [1901] A. C. at p. 10, Wood v. McCarthy, [1892] 1 Q. B. 775, and Cornell v. Smith, 14 P. R. 275, at p. 277, referred to.

W. J. Elliott, Toronto, solicitor for plaintiff.

MEREDITH, C.J.

JANUARY 8TH, 1902.

TRIAL.

MCNEIL v. DAWSON.

Fraudulent Conveyance—Mortgage by Wife to Husband, in Effect a Preference, within 60 Days of Creditors' Action—Presumption not Rebutted—R. S. O. ch. 147, sec. 2, sub-sec. 3.

Action tried at St Catharines, brought on the 23rd May, 1901, by the plaintiff on behalf of herself and all creditors of defendant Loretta J. Dawson against her and her husband, to set aside as a fraudulent preference, a mortgage dated 10th April, 1901, made by her in favour of her husband.

G. H. Levy, Hamilton, for plaintiffs.

J. E. Varley, St. Catharines, for defendant G. Dawson.

G. F. Peterson, St. Catharines, for defendant Loretta J. Dawson.

MEREDITH, C.J.—When the mortgage was given, the wife was insolvent to her knowledge and that of her husband . . . there was an indebtedness by the wife to her husband at the time the mortgage was given, and the mortgage has the effect of giving him a preference, and the intent to

give it is presumed against the husband: R. S. O. ch. 147, sec. 2, sub-sec. 3 . . . The evidence is not satisfactory of the existence of an antecedent agreement to give the mortgage, and on all the facts the husband has failed to rebut the presumption. Judgment for plaintiffs setting aside the mortgage, with costs.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for plaintiffs.

G. F. Peterson, St. Catharines, solicitor for defendant Loretta J. Dawson.

J. E. Varley, St. Catharines, solicitor for defendant George Dawson.

MEREDITH, C.J.

JANUARY 8TH, 1902.

TRIAL.

MUNRO v. TORONTO RAILWAY CO.

Infant—Lease by—Repudiation—Partition—Amendment—Parties.

Action tried at Toronto, brought to have declared void a lease by plaintiff and two others to defendants, for ten years from 1st April, 1896, of Munro Park, east of Toronto, in the township of York. On 10th August, 1900, plaintiff became 21 years of age, and at once repudiated the lease. The property was then fairly divided among the three lessors, and plaintiff brought this action, asking for a confirmation of the partition already made or for an order for another one and for possession of his portion.

C. Millar, for plaintiff.

J. Bicknell, for defendants.

MEREDITH, C.J.—The partition already made is not binding on defendants. They were not parties to it, and are not bound by it, even if fairly and equitably made, which, if their interests under the lease are to be affected by it, I think it was not: *Cornish v. Gest*, 2 Cox 27; *Willis v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 V. & B. 351. It would not be proper to allow plaintiff to amend at trial and, making defendants parties, proceed. The proper course is to postpone the trial and give plaintiff leave to amend, adding his co-lessors as parties and otherwise as advised; and to defendants to amend as advised.

All costs to be disposed of by the Judge who tries the case on the amended pleadings. Leave to plaintiff, if he does not wish to amend as indicated, to speak to the case.

Millar, Ferguson, & Hughes, Toronto, solicitors for plaintiff.

J. Bicknell, Toronto, solicitor for defendants.

MEREDITH, C.J.

JANUARY 8TH, 1902.

TRIAL.

THOMAS v. CALDER.

Fraudulent Conveyance—Creditor, Mortgagee as well as simple contract creditor—13 Eliz. ch. 5.

Action tried at Stratford, brought by simple contract creditors to set aside a conveyance of land and bill of sale of goods made by defendant John Calder to his wife, defendant Catherine Calder.

G. F. Shepley, K.C., for plaintiffs.

J. Idington, K.C., for defendants.

MEREDITH, C.J.—Had the plaintiffs been only simple contract creditors they would be entitled to succeed, but the evidence establishes that they are secured creditors, having a second mortgage of the land in question, made before the conveyance, and it is ample security for their claims. The result is that the plaintiffs are not entitled to relief. It has long been settled that a mortgagee is not a creditor within 13 Eliz. ch. 5, unless the mortgaged property is not sufficient to satisfy the debt secured by his mortgage. Refer to May on Fraudulent Conveyances, 2nd ed., pp. 57, 163-4; Masuret v. Mitchell, 26 Gr. 435; Crombie v. Young, 26 O. R. 194; Sun Life Assurance Co. v. Elliott, 31 S. C. R. at p. 98.

It is immaterial that defendants attacked the mortgage and sought to set it aside, because they failed, with the result that the mortgage has been declared valid and plaintiffs are now and have always been fully secured creditors. Action dismissed, but, in view of all the circumstances, without costs.

Smith & Steele, Stratford, solicitors for plaintiffs.

Idington & Robertson, Stratford, solicitors for defendants.

MEREDITH, C.J.

JANUARY 8TH, 1902.

LOUNT, J.

DIVISIONAL COURT.

PETERS v. WHYTE.

Trial — Jury — Judge's Charge — Malicious Prosecution — Want of Reasonable and Probable Cause—Before Judge Rules as to, Facts must be passed upon by Jury.

Motion by plaintiff to set aside a non-suit entered by Ferguson, J., at the trial at Stratford of an action for malicious prosecution, and for a new trial. The trial Judge ruled that the plaintiff had not shown the absence of reasonable and probable cause for the prosecution, which was for

perjury. The charge of perjury was dismissed by the magistrate.

E. Sydney Smith, K.C., for plaintiff.

J. P. Mabey, K.C., for defendant.

Judgment of the Court was delivered by

MEREDITH, C.J.—Although it appeared in the plaintiff's case at the trial that a mass of evidence was given at the hearing before the police magistrate in direct contradiction of what he had there testified, yet as the appellant, who was examined as a witness on his own behalf at the trial testified that what he had deposed to was true to the knowledge of the respondent, the trial Judge was not in a position to determine whether absence of reasonable and probable cause was shown until the jury had passed upon the disputed question of fact, for if plaintiff's version was accepted by the jury there was not reasonable and probable cause for the prosecution, for upon that hypothesis what the plaintiff had sworn to was true to the knowledge of the defendant. There should be a new trial. Costs of last trial and motion to be in the action.

Smith & Steele, Stratford, solicitors for plaintiff.

McPherson & Davidson, Stratford, solicitors for defendant.

MEREDITH, C.J.
LOUNT, J.

JANUARY 8TH, 1902.

DIVISIONAL COURT.
CLUNIS v. SLOAN.

Slander—Privileged Occasion—Proof of Malice Necessary—Social or Moral Duty—Question for Judge, not Jury—Damages not Excessive.

Motion by defendant to set aside verdict and judgment for plaintiff for \$500 in an action for slander tried before Meredith, J., and a jury at Chatham, and to dismiss the action or for a new trial upon the grounds of misdirection and excessive damages. The plaintiff is married to the sister of the defendant. The plaintiff alleged that the defendant had on four different occasions spoken words accusing the plaintiff of having stolen binder twine. The defendant contended that one of the occasions was privileged, and the jury should have been told that unless they found express malice the defendant was entitled to a verdict, and there was no evidence proper to submit to the jury as to other occasions. On the first occasion in question which was claimed as privileged, the defendant admitted that the words were spoken to his mother and sister, and he denied speaking on any other occasion.

R. C. Clute, K.C., for plaintiff.

M. Houston, Chatham, for defendant.

Judgment of the Court was delivered by

MEREDITH, C.J.—The first occasion was not privileged, and therefore proof of malice was not necessary. The existence of a social or moral duty upon which the privilege rests is one for the Judge and not the jury: *Stuart v. Bell*, [1891] 2 Q. B. 341. There was no such duty in the present case, and the objection to the charge fails. There is no ground for the interference, and the damages are not excessive. Motion dismissed with costs.

Scane, Houston, Stone, & Scane, Chatham, solicitors for plaintiff.

W. F. Smith, Chatham, solicitor for defendant.

MEREDITH, C.J.

JANUARY 9TH, 1902.

TRIAL.

McGOWAN v. ARMSTRONG.

Limitation of Actions—Title by Possession of his Father's Land by a Son who does not Pay Rent nor Acknowledge Title for 11 Years—Assessment of Son as Tenant and both afterwards as Owners—Tenancy at Will—Settlement in Ignorance of Rights not Binding—Doe d. Bennett v. Turner, 7 M. & W. 226, distinguished—Fane v. Fane, L. R. 20 Eq. 698, followed.

Action tried at Toronto brought to recover payment of the first instalment, \$333.33, of a charge payable in twelve annual payments, upon certain land in the township of Chinguacousy, created by the will of Edward Armstrong, deceased, who died in 1900, having devised the land, subject to the charge, to his son, the defendant. The plaintiffs are the executors and other beneficiaries under the will.

E. D. Armour K.C., and W. B. Milliken, for plaintiffs.

E. F. B. Johnston, K.C., and J. D. Montgomery, for defendant.

MEREDITH C.J.—The defendant was put by his father in possession of the land in 1879, has continued in possession ever since, occupying it for his own benefit, though expecting some burden with respect to it to be imposed by his father; having the profits, paying no rent, and giving no acknowledgment of his father's title, and having made valuable improvements; and therefore upon such state of facts the father's title has become extinguished: R. S. O. ch. 133. The defendant was a tenant at will, the tenancy was never determined, and the defendant acquired title after eleven years: sec. 5, sub-sec. 7. There is no evidence that he was caretaker or servant. If the tenancy had been determined, a

new one would have to have been created to stay the running of the statute. No such tenancy was created. The fact that the property was assessed to the father as owner and the son as tenant in 1879 and 1880, and to both as freeholders from 1880 to 1899, and that in 1882 the assessment was at the instance of the son, does not authorize the drawing of an inference that a new tenancy at will was created within eleven years before action: *Doe d. Bennett v. Turner*, 7 M. & W. 226, is distinguishable. The agreement relied on by plaintiffs was made by defendant in ignorance of his rights, and is not binding: *Fane v. Fane*, L. R. 20 Eq. 698: and any election made by him to take under the will is part of the same transaction and falls with it. Action dismissed without costs.

Mulock, Mulock, Thomson, & Lee, Toronto, solicitors for plaintiffs.

Montgomery, Fleury, & Montgomery, Toronto, solicitors for defendant.

MEREDITH, C.J.

JANUARY 9TH, 1902.

CHAMBERS.

EVANS v. JAFFRAY.

Discovery — Production — Examination—Promotion Agreements and Expenses.

Appeal by defendants Cox and Ryckman from order of Master in Chambers requiring defendant Ryckman to file further and better affidavit on production, and requiring defendants Cox and Ryckman respectively to attend and answer certain questions which they had declined to answer upon their examination for discovery, and to be examined as to all matters consequent on or arising out of or necessary to make complete their answers to these questions.

E. F. B. Johnston, K.C., and C. W. Kerr, for defendants Cox and Ryckman.

F. A. Anglin, for plaintiff.

MEREDITH, C.J.—Held, that the questions intended to elicit from defendants information as to the source from which came the \$20,000 received by defendant Jaffray from defendant Ryckman after the company which was formed had been floated, are irrelevant and such as defendants are not bound to answer; that the other questions which defendant Cox declined to answer relate to the agreements which were ultimately entered into for the purchase of the businesses which were transferred to the company formed, and are relevant and should have been answered; that as to questions 17, 19, and 67, 17 and 19 cover practically the same

point, and these questions have no bearing on the issues between the parties, at all events at this stage of the proceedings, and that this is one of the cases in which as to these questions the proceeding by examination for discovery is being abused; that upon the whole the order appealed from should be varied by confining it to requiring defendant Cox to reattend and submit to be examined as to the nature of the agreements which were entered into on behalf of the promotion syndicate with the companies; but that, if the plaintiff takes nothing by the further examination of defendant Cox, the costs of such further examination must be borne by plaintiff; that defendant Ryckman ought not to be required to answer as to the contents of the agreements made by the promoters. If in writing he is not bound to produce them, and if he is privileged from producing them, he cannot be interrogated as to their contents. Costs of appeal and below to be in the action. He referred to *Bray on Discovery*, p. 429, and *Davies v. Waters*, 9 M. & W. 608.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Ryckman, Kirkpatrick, & Kerr, solicitors for defendants Cox and Ryckman.

BRITTON, J.

JANUARY 9TH, 1902.

TRIAL.

BARR v. BIRD.

Fraud—Estoppel—Patent—Registration—Mortgage—Notice.

Action tried at Rat Portage, to compel the registration of a patent of mining location McA. 163, Rainy River, to establish a mortgage against it, and for damages for cutting and removing timber.

The plaintiff lent \$500 to defendant C. A. Spence, who represented that defendant R. S. Spence owned the location, and that the patent to him would soon issue. Subsequently C. A. Spence procured an assignment of the interest of R. S. Spence, and the patent issued to C. A. Spence for a half interest, the other half going to D. & E. Coxwill, not parties to the action. Plaintiff registered the mortgage and a caution in the local Land Titles office, and commenced this action.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for plaintiff.

C. A. Masten and W. B. Towers, Rat Portage, for defendant Bird.

BRITTON, J.—Held, upon the facts, that defendant C. A. Spence was estopped from setting up his ownership of the

undivided half so as to defeat plaintiff's claim; that defendant Bird cut the timber with full notice of the mortgage and caution, and is liable for reduction in value; and directed judgment for registration and that plaintiff is entitled to have his mortgage registered and to a declaration that it is binding on the undivided half interest now in name of defendant C. A. Spence, and to \$187.50 damages and full costs. The \$187.50 to be credited on the mortgage.

T. R. Ferguson, Rat Portage, solicitor for plaintiff.

W. B. Towers, Rat Portage, solicitor for defendant Bird.

MEREDITH, J.

JANUARY 10TH, 1902.

CHAMBERS.

REX v. KENNEDY.

Conviction—Prisoner not consenting—Habeas Corpus—Criminal Code, sec. 783.

Motion upon the return of a *habeas corpus* for discharge of prisoner tried, but without his consent, under sec. 783 of the Criminal Code, and convicted.

E. B. Stone, Peterborough, for prisoner.

J. R. Cartwright, K.C., for the Crown, offered to consent to order being made under sec. 752 of the Criminal Code.

MEREDITH, J.—The prisoner must be discharged, and, his counsel consenting, there will be the usual clause in the order protecting the magistrate. There seems no reason against his being again convicted if the authorities choose to proceed.

MEREDITH, J.

JANUARY 10TH, 1902.

CHAMBERS.

BROTHERS v. ALFORD.

Municipal Corporation—By-law—Validity of—Conviction and Fines—Order, for Breaking Hired Buggy—Appeal to Sessions—Dismissal on Preliminary Objection—Not a Bar to Certiorari.

Motion for *certiorari* to remove a conviction by the police magistrate of Stratford. Defendant hired a horse and buggy from a liveryman, and the buggy was injured, and under the consolidated by-laws of the city of Stratford the defendant was fined for refusing to pay the damage sustained owing to the breaking of the buggy. It was pointed out on behalf of prosecutor that an appeal had been taken to the General Sessions of the county of Perth and the conviction affirmed.

J. J. Coughlin, Stratford, for defendant.

D. L. McCarthy, for prosecutor.

MEREDITH, J., granted the writ, it appearing that the appeal had really not been heard owing to it being dismissed on preliminary objections.

Mabee & Makins, Stratford, solicitors for prosecutor.

Woods & Coughlin, Stratford, solicitors for defendant.

MEREDITH, J.

JANUARY 10TH, 1902.

WEEKLY COURT.

RE SOUTHWOLD SCHOOL SECTIONS.

Public Schools—Alteration of Boundaries—Reference for—Award on—Uniting instead of Altering, Invalid—1 Edw. VII. ch. 39, sec. 42, sub-sec. 1.

Motion by John Culver and the board of public school trustees for school section number 13 of the township of Southwold for an order setting aside an award dated the 19th November, 1901, made by arbitrators appointed by the county council of the county of Elgin, under 1 Edw. VII. ch. 39, sec. 42, sub-sec. 1, to hear an appeal to the county council against the refusal of the township council of the township of Southwold to alter the boundaries of school sections 12, 13, and 14, for the purposes of enlarging school section 12, by which award the arbitrators purported to consolidate into one school section the sections numbered 12 and 13, and for an order for payment of the costs of the application.

A. B. Aylesworth, K.C., for applicants.

J. M. Glenn, K.C., for township of Southwold and county of Elgin.

T. W. Crothers, St. Thomas, for individual ratepayers of township.

MEREDITH, J., held that the arbitrators had no power to unite two school sections, upon an appeal against a refusal to comply with an application to alter boundaries only. The ratepayers must consent by an application to the township council for the specific purpose. Order made, but without costs, for there is no person or corporation against whom they can rightly be awarded.

Andrew Grant, St. Thomas, solicitor for complainant.

J. M. Glenn, St. Thomas, solicitor for corporations of county of Elgin and township of Southwold.

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MEREDITH, C.J.

JANUARY 10TH, 1902.

TRIAL.

HUMPHRIES v. AGGETT.

Deed—Delivery—Retention by Grantor—Possession by Grantee with Rents and Profits—Evidence from Circumstances of, and Paying for Permanent Improvements—Executor and Trustee—Breach of Trust.

Action tried at Peterborough, brought to have it declared that an instrument dated 7th January, 1852, made by Henry Hurl Humphries sen. to Robert N. Humphries, purporting to convey certain land, was never delivered, and, therefore, did not operate, and consequently that such land formed part of the estate of Henry Hurl Humphries jun., to whom it was devised, subject to a life estate of Robert N. Humphries and his wife, by the grantor, who died in January, 1898, and also to set aside a conveyance of the land, dated 4th May, 1898, made by Robert N. to defendant; and also to have defendant removed from his office of co-executor and co-trustee with plaintiff of the will of Henry Hurl Humphries jun. The defendant, finding the conveyance of 1852 among his testator's papers, it is alleged, procured its registration, and then the conveyance of 1898 from Robert N. Humphries to himself.

E. B. Edwards, K.C., for plaintiff.

A. B. Aylesworth, K.C., for defendant.

MEREDITH, C.J., held that the conveyance made in 1852 was delivered and did pass the land to the grantee. All the words referring to assigns were struck out, and, having regard to the kind of man Robert was shown to have been, and to the fact that he purchased and paid for the land, the idea was that if Robert died without issue it would revert to the grantor. There is nothing inconsistent with the view that the deed of 1852 was delivered, in the fact that the grantor, after the death of Robert and his wife, assumed a

power to dispose of the land; and the non-registration is explained by considering the kind of man Robert was—shiftless and easily imposed upon. The conduct and acts of Henry Hurl Humphries jun., and statements made by him as to Robert's ownership, are inconsistent with the case plaintiff sets up. Robert had the use and enjoyment from 1852 until his death, and the account kept by Henry Hurl Humphries jun., after Henry Hurl Humphries sen. handed him the deed of 1852, as well as the fact that permanent improvements were made and their cost deducted from Robert's rents, are strong circumstances in the conclusion that Robert was the real owner. Henry Hurl Humphries jun. does not appear to have made any claim to the land. The handing of the deed of 1852 over to Robert, which does not, however, appear to have been proved, would not, even if proved, have constituted a breach of trust. Robert had frequently demanded it, but it is to be regretted that defendant did not frankly inform his co-executor what had been done. The testator, having no estate in the land, nor being in possession, nor claiming it, the defendant was entitled to a conveyance of it from Robert, and is not a trustee for anyone. Action dismissed, but without costs.

E. B. Edwards, Peterborough, solicitor for plaintiff.

A. L. Colville, Campbellford, solicitor for defendant.

JANUARY 13TH, 1902.

DIVISIONAL COURT.

BROTHERSON v. CORRY.

Master and Servant—Negligence of Master—Sufficient Evidence of, for Submission to Jury—Res Ipsa Loquitur.

Walsh v. Whitely, 21 Q. B. D. at p. 378; Moffatt v. Bate-man, L. R. 3 P. C. 115, approved.

Per BRITTON, J., Cripps v. Judge, 13 Q. B. D. 583, should be followed.

Motion by plaintiff to set aside nonsuit entered by LOUNT, J., in an action for negligence, tried at Peterborough, and for a new trial. Action by Andrew Brotherson, a labourer of the township of Otonabee, against James A. Corry, and E. G. Laverdure, contractors for the construction of a section of the Trent Valley Canal, to recover damages for injuries received by plaintiff while engaged in working for defendants in such construction. A derrick used in the work fell upon plaintiff, owing to the alleged negligence of defendants in not sufficiently supporting the derrick, and by reason of a defect therein.

D. W. Dumble, Peterborough, for plaintiff.

A. B. Aylesworth, K.C., and D. O'Connell, Peterborough, for defendants.

Judgment was delivered on January 13th, 1902.

FALCONBRIDGE, C.J.—There was not sufficient evidence of defendants' negligence to justify a submission to the jury. The accident was due to a very common cause of injury to workmen,—the breaking or falling of something, which breaking is not necessarily attributable to negligence of defendants: *Moffat v. Bateman*, L. R. 3 P. C. 115, explaining or distinguishing *Scott v. London Dock Co.*, 3 H. & C. 596.

STREET, J.—In my opinion the nonsuit was right and should not be disturbed, because no negligence on the part of defendants was shewn. It is not a case in which the doctrine of *res ipsa loquitur* should be applied, because evidence of proper and careful construction was given by defendants: *Scott v. London Dock Co.*, 3 H. & C. 596; *Moffatt v. Bateman*, L. R. 3 P. C. 115; *Black v. Ontario Wheel Co.*, 19 O. R. 578. . . . The case is one, therefore, in which the jury are asked to say that the derrick was negligently constructed, when no witness on either side has said so, and where the only opinion expressed by any witness is that it was properly and not negligently constructed. The case is within the doctrine laid down in *Walsh v. Whitely*, 21 Q. B. D. at p. 378.

BRITTON, J.—The case is not distinguishable in principle from *Cripps v. Judge*, 13 Q. B. D. 583, in which *Heske v. Samuelson*, 12 Q. B. D. 30, was affirmed. At the close of plaintiff's case, if the defendants had not put in any evidence, the jury should have been asked this question:—"Was the derrick fit to be used for the purpose it was being used at the time of the accident?" I do not think the evidence given by defendants warranted the withdrawing of the case from the jury. Even if the evidence on the part of the defence was not contradicted by witnesses called by plaintiff, still the jury, and not the Judge, should have pronounced upon it. Again, the iron strap, shewn in figure 2 and figure 3, slipped over the top of the bolt because it had no head. Omitting to put a head on the bolt may have been a specific act of negligence on defendants' part, and the jury should have been asked to say whether or not that omission was the cause of the accident, and, if so, was it negligence, and, if so, were defendants liable.

Motion dismissed with costs, BRITTON, J., dissenting.

D. W. Dumble, Peterborough, solicitor for plaintiffs.

Stratton & Hall, Peterborough, solicitors for defendants.

JANUARY 14TH, 1902.

COURT OF APPEAL.

WHIPPLE v. ONTARIO BOX CO.

Jurisdiction—Certificate of Judgment of Court of Appeal—Power to amend after issue—Mistake—Costs.

Where a certificate of the Court was issued setting aside the judgment dismissing the action, and directing judgment to be entered for plaintiff for \$50 damages, and the costs of the action, the Court, upon application, amended the certificate to accord with its intention, to give costs on the High Court scale.

Motion by plaintiff to amend the certificate of this Court issued upon the allowance of the appeal of the plaintiff from the judgment at the trial. The written opinion on the appeal was delivered by LISTER, J.A., setting aside the judgment dismissing the action, and directing judgment to be entered for plaintiff, for \$50 damages, and full costs of the action. The certificate as issued awarded the plaintiff \$50 damages, and the costs of the action. Objection was taken on the taxation of the plaintiff's costs, that the costs should not be taxed on the High Court scale, but as if the action had been brought in a division Court, and this motion was therefore made in Chambers before LISTER, J.A., who referred it to the Court.

A. B. Aylesworth, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants. "Full costs of action" means "costs of the action:" Irwine v. Reddish, 5 B. & Al. 786; Avery v. Wood, [1891] 3 Chy. 115. The certificate has issued. It is in accordance with the written opinion, and there has not been any mistake. There is, therefore, no jurisdiction to amend.

AYLESWORTH in reply.—The costs of the motion should be to plaintiff: Hardy v. Pickard, 12 P. R. 428.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, LISTER, J.J.A.) was delivered at the conclusion of the argument by ARMOUR, C.J.O., OSLER, J.A., dissenting as to the costs of the motion:—The intention of the Court was to give costs on the High Court scale, including the costs of the interim injunction, and the certificate must be amended to carry out that intention. Costs of the motion to plaintiff.

J. J. Scott, Hamilton, solicitor for plaintiff.

Washington & Beasley, Hamilton, solicitors for defendants.

LOUNT, J.

JANUARY 13TH, 1902.

CHAMBERS.

RE GILLEM.

Infant—Custody of—Right of Father Paramount to that of Deceased Wife's Mother—Evidence of Reputable Witnesses—Credit to be Attached to.

Re Young, 29 O. R. at p. 668, referred to.

Application by James J. Gillem, father of Veronica Gillem, an infant, for the custody of his child.

J. N. Counsell, Hamilton, for J. J. Gillem.

Arthur O'Heir, Hamilton, for W. & M. Warnick.

LOUNT, J.—The dispute being between the deceased wife's mother, having no maternal right, and the father, he has as against her and all others, except his wife, if she were living, the paramount right, and unless such right has been forfeited by him by misconduct, or he is shewn to be otherwise unfit or incapable, he is not to be deprived of that right. On such an application as the present, a strong case of misconduct and unfitness must be made out on the part of the applicant to justify the Court in depriving the father of the custody, control, care and education of his child. No such case has been established. More weight and credit is to be attached to the statements made in the affidavits filed on behalf of the applicant than to those in reply, the deponents for the applicant being persons of good standing and repute, having had long and full opportunity of knowing the applicant; while the facts alleged in the affidavits in answer, are shaken by the cross-examination of their makers; and there is internal evidence that some of the persons did not fully understand and appreciate what they were swearing to. The arrangement spoken of by W. Warnick, as having been made with the applicant, is one that cannot be upheld even if it were fully established, and having regard to all the surrounding circumstances, M. Warnick's custody of the child is as consistent without such arrangement as with it. The applicant should have the custody of his child until and unless some further order shall be made. Costs to the applicant. Refer to *Re* Young, 29 O. R. at p. 668.

Mackelcan & Counsell, Hamilton, solicitors for Gillem.

Staunton & O'Heir, Hamilton, solicitors for W. & M. Warnick.

Moss, J.A.

JANUARY 13TH, 1902.

COURT OF APPEAL—CHAMBERS.

ROTHSCHILD v. SILVERMAN.

Appeal—Leave to Appeal to Court of Appeal—Finding of Trial Judge.

Motion by plaintiff for leave to appeal from order of a Divisional Court (*Globe*, 8th January, 1902), affirming judgment of STREET, J.

C. Millar, for plaintiff.

J. H. Clary, Sudbury, for defendant.

MOSS, J.A.—There is no dispute as to the law; it is solely a question of fact. The trial Judge found against the plaintiff's testimony, and his conclusion should not be disturbed, and it involves a finding that the release of the judgment, to set aside which this action is brought, was a fair transaction. The Divisional Court agreed with the trial Judge, and under the circumstances a further appeal ought not to be sanctioned. Motion refused with costs.

Clary & Parker, Sudbury, solicitors for plaintiff.

McVeity & Culbert, Ottawa, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 13TH, 1902.

TRIAL.

ADAMS v. CULLIGAN; HOWE v. CULLIGAN.

Master and Servant—Negligence of Master—Mine—Defective Machinery—Improper Means of Ascent and Descent—By Ladders—By Common Ore Bucket—Contributory Negligence of Workman—Fatal Accident Act—Death of Widow of Deceased after Action Brought.

McHugh v. G. T. R. Co., 32 O. R. 234, 21 C. L. T. Occ. N. 581, followed.

Actions at common law and under Workmen's Compensation Act, against the defendants Culligan and Gilchrist, who are the owners of a mine in the Rainy River District, for damages for causing by their negligence the death of one Adams, the son of the plaintiff Adams, and one Howe, the brother-in-law of the present plaintiff Howe. The Howe action, as originally brought, was in the name of Aurora Matilda Howe, the widow of the deceased miner, and the only person entitled under R. S. O. c. 166, s. 3. Pending the trial the plaintiff, A. M. Howe, died, and the action was revived in the name of her brother-in-law, who is the administrator of her estate. By order of Court the actions were consolidated, but it was provided that the damages should

be assessed separately. The plaintiffs allege that on the night of the accident, when the engineer blew the whistle for the men to go to work, the bucket was hanging over the open shaft, having been left by the men when they came up at 6 o'clock. The men, believing that the engineer was at his post, and that the brakes and machinery were properly applied stepped into the bucket—four men in all— and it commenced to move, and in a moment fell away, and fell down the shaft. It was stopped by the engineer after it had descended about ninety feet, but the sudden drop, no doubt, threw three of the men out of the bucket, for they were found at the bottom of the shaft, one of them dead, and the other two dying shortly afterwards. The brake, which was supposed to be strong enough to hold any weight that the hoist was capable of lifting, had, possibly by means of wear, become loose, so that when locked in place it was not sufficient to hold the bucket with the men in it. There was some additional means used for holding the bucket in place, namely, a friction clutch, which threw the machinery into gear. If both brake and friction clutch were applied, they together would hold any weight. The engineer stated that the brake was properly locked, but he could not tell the position of the friction clutch. The cause of the accident, no doubt, was that the brake, while locked, was not sufficient to hold the bucket with the men in it, and that the friction clutch was not properly set, and therefore the bucket fell away when the men got in. The plaintiffs allege, (1) that the ladders provided for the men going into the mine were in a defective condition, (a) that they did not comply with the provisions of the Mines Act, (b) that they were insufficient to enable the men to enter the mine in safety. (2) That owing to the defective conditions of the ladders, they used the bucket to go down the shaft, and that the management authorized its use; that the bucket, being a common ore bucket, was unsuitable for the purpose, and the defendants were negligent in not providing a suitable means for the men getting to their work. (3) That the hoisting apparatus was defective in that the brakes were not in proper working order, and had not been in proper working order for some time prior to the accident, to the knowledge of the defendants, or their foreman. The defendants denied negligence, and alleged (1) That as the mine was in process of development, the ladders were as good as could reasonably be expected, and having regard to the mine, that they were suitable for the purpose, and that there was no occasion for the men to use the bucket. (2) That the men using the bucket did

so at their own risk. (3) That the men were guilty of contributory negligence in getting upon the bucket on the night of the accident, without first ringing the bell so as to make sure the engineer was in his place. The actions were tried at Rat Portage in July, 1901, and all the evidence taken, except that of Mr. Blue, Inspector of Mines, who had made a test of the machinery after the accident, and the Chief Justice desired to have Mr. Blue's evidence in order that he might ascertain exactly the result of the test. On the return of this evidence, argument was concluded.

N. W. Rowell and W. J. Moran, Rat Portage, for plaintiffs.

R. C. Clute, K.C., and A. C. Boyce, Rat Portage, for defendants.

FALCONBRIDGE, C.J., found the facts in favor of the plaintiffs, and that the accident occurred by reason of the defective machinery and plant in use in the mine, for which the defendants were responsible, and he found against the defendants on the issue of contributory negligence, and assessed the damages to the plaintiff Adams, the father of the deceased, who, at the time of his death, was between twenty and twenty-one years old, at \$750. Having regard to the fact that Mrs. Howe lived for about a year and a half after her husband's death, he assessed the damages in the Howe action at \$850, but held that he was bound by *McHugh v. G. T. R.*, 32 O. R. 234, 21 C. L. T. Occ. N. 581, to dismiss the Howe action, but assessed the damages in case that decision should be reversed by the Supreme Court, or in case it was desired to appeal.

Moran & Mackenzie, Rat Portage, solicitors for plaintiff.

Boyce & Draper, Rat Portage, solicitors for defendants.

JANUARY 13TH, 1902.

COURT OF APPEAL.

LUTON v. TOWNSHIP OF YARMOUTH.

Highway—Want of Repair—Knowledge of, by Corporation—Accident—Causa Causans—Finding of Fact by Trial Judge—Interference with, when Evidence Conflicting—Damages not Excessive.

Atkinson v. Chatham, 31 S. C. R. 61, distinguished.

Sherwood v. Hamilton, 37 U. C. R. 410, and Toms v. Whitby, U. C. R. 195, followed.

Lucas v. Moore, 43 U. C. R. 334, 3 A. R. 602 specially referred to.

Appeal by defendants, from judgment for \$1,750 of ROBERTSON, J., in action for damages for injuries sustained

owing to alleged non-repair of a highway. The plaintiff was driving a team of horses, attached to a waggon filled with wood, northward on the road leading north from the village of New Sarum, and when descending Luton hill, which is a short distance north from Edgeware road, his horses took fright at the noise made by some wood which fell off the waggon, and ran over the embankment close to the bridge which spans the west branch of Catfish Creek. The road becomes narrow as it approaches the bridge, and is rutty, and without railings. Plaintiff's ankles were both broken in the fall, and he will be permanently lame from the effects of the mishap. The trial Judge found that the roadbed at the top of the hill, near the bridge, was really 10 feet 5 inches wide, the east portion of the remaining $6\frac{1}{2}$ feet of its width, consisting of a rut or washout, one foot deep and three feet wide, running 150 feet down the hill; that the road so sloped from the east that almost invariably a loaded waggon going down would slide into the washout; that there was, about six feet from the washout, a large stone embedded in the road, against which the right wheels of the waggon struck, causing the waggon to slide into the washout, and the sudden dropping into it of the left wheels made the wood fall out, and the noise frightened the horses, which ran away; and that the condition of the road was known by defendants. He held that this case was clearly distinguishable from *Atkinson v. Chatham*, 29 O. R. 518, *sub nom.* *Bell Telephone Co. v. Chatham*, 31 S. C. R. 61; that here the *causa causans* of the accident was not the running away of the horses, but the sliding into the washout of the waggon, owing to the bad and inefficient state of the road, *Hill v. New River Co.*, 9 B. & S. 303, being in point; that the plaintiff's success did not depend on his shewing that his horses were not vicious; and that the judgment of the Supreme Court in *Bell Telephone Co. v. Chatham*, *supra*, in no way displaced the law declared in *Sherwood v. Hamilton*, 37 U. C. R. 410, and *Toms v. Whitby*, 35 U. C. R. 195.

C. Robinson, K.C., and W. L. Wickett, St. Thomas, for defendants.

T. W. Crothers, St. Thomas, for plaintiff.

The appeal was argued on December 10th, 1901, before the full Court, and judgment was delivered on January 13th, 1902, by ARMOUR, C.J.O., and LISTER, J.A. The questions presented in the case are purely questions of fact. The weight of evidence involves the degree of credibility to be attached to the statements of the different witnesses, and when such statements are conflicting, much reliance must be

placed upon the conclusion at which the trial Judge has arrived in respect to them, and as he has had an opportunity, which this Court cannot have, of hearing and seeing the witnesses, and being as it were in the atmosphere of the case at the trial, his conclusion should not be set aside unless it plainly appears to be wrong. There is nothing in the evidence which should justify any interference with the findings of the judge, and as he believed the evidence for the plaintiff, as to the nature and extent of his injury, that evidence amply warrants the damages awarded. Refer, in addition to the cases cited below, to *Lucas v. Moore*, 43 U. C. R. 534, 3 A. R. 602. Appeal dismissed with costs.

Crothers & Price, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendants.

BRITTON, J.

JANUARY 16TH, 1902

TRIAL.

CITIZENS TELEPHONE AND ELECTRIC LIGHT CO. v.
TOWN OF RAT PORTAGE.

Municipal Corporation—Contract for Light, etc., with—Reduction of Price by Corporation—By-law—Reasonableness of—Construction of—Validity of.

Action tried at Rat Portage, brought to restrain the defendants from amending by-law No. 105 as already amended, so as to reduce the rates which the plaintiff company is entitled to charge for light to consumers in the town of Rat Portage.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for plaintiffs.

C. A. Masten, and A. McLennan, Rat Portage, for defendants.

BRITTON, J.—By-law 105 was passed on June 30th, 1892, and under it, a contract was entered into between the parties in relation to the placing of poles and wires for the supply of electric light to citizens. The by-law is part of the contract, and bears the same date. Section 10 of the by-law is as follows:—"The said corporation reserves the right to alter or amend this by-law in whole or in part, and to make such further conditions as the council of the town of Rat Portage may think proper." The contract and section 11 of the by-law provided, that the rates which were thereafter to be charged should be at least ten per cent. lower than the rates then being charged by another company, and it was provided by section 12 of the by-law, that in the event of amalgamation by the companies, the rights created under by-law 105

should become null and void, and absolutely forfeited. The companies subsequently amalgamated with the assent of the defendants, who passed a new by-law in November, 1892, confirming a new contract, and confirming by-law 105 as amended. The amendment provided that plaintiffs should not charge more than 15 per cent. above the then advertized rates, during the term of 10 years. The defendants now to propose, under the said clause 10, to pass a by-law providing that the plaintiffs shall not be at liberty to charge, as a maximum, more than 20 per cent. below the present schedule rates, and, as they can now charge up to 15 per cent. above advertized rates, the difference to them would be 35 per cent.

I think the only reasonable construction to be put in section 10 is, that the defendants can amend the by-law as to the poles, their location and erection, and the installing the telephone and electric light system, having all that done under municipal direction, and in a way to protect and benefit citizens in the use of streets, and respecting provisions in sections preceding section 10, but not in reducing the prices so as to compel plaintiffs to furnish light at a loss, or to go out of business. Such a result was never contemplated, and the exercise of such power by a municipality would be unreasonable: *City of Toronto v. Toronto Street Railway Co.*, 15 A. R. 30, per BOYD, C., and per HAGARTY, C.J.O., at p. 36, and the case therein cited of *Elwood v. Bullock*, 6 Q. B. 401, in which Sir J. Coleridge says: "Whether a by-law is for the regulation of trade or for purposes of police, it must be reasonable and just." The object of defendants' by-law should be the good and welfare of citizens generally, and even if the attempted amendment to reduce rates were valid, the defendants, under the circumstances in evidence, should not be permitted to use that power in the supposed interest of one class of citizens against another. . . . To force plaintiffs to supply light at a loss is not in the public interest. . . . There is no evidence of actual malice on the part of individual members of the defendants' council, but it is a fair inference from what has taken place, that the council have in view the getting control of the electric light plant by pressure, rather than a desire to reduce rates for the public good. . . . As a by-law to remedy a private grievance will not stand, so a by-law under the circumstances of this case ought not to be permitted. It is not necessary, in the view I take of the case, for me to decide whether or not it is within the powers of defendants' council, having once amended by-law 105, to again amend, . . . but it may well be doubted, in the face of the amendments already made, whether they can do

so without plaintiffs' consent. Judgment should be entered for plaintiffs, with a declaration that the defendants have not the right, during the existence of the present contract, to alter or change, without the consent of the plaintiffs, the rates charged in the conduct of its light and telephone business. The injunction already granted is continued. Costs to plaintiffs on High Court scale.

T. R. Ferguson, Rat Portage, solicitor for plaintiffs.

McLennan & Wallbridge, Rat Portage, solicitors for defendants.

BRITTON, J.

JANUARY 16TH, 1902.

TRIAL.

TOWN OF RAT PORTAGE v. CITIZENS ELECTRIC CO.
OF RAT PORTAGE.

Municipal Corporation—Electric Lighting of Streets—Contract—Execution by Acting Mayor—Contract Partly Performed—By-law to Confirm—Necessity of—Tax By-law—Effect of—R. S. O. ch. 223, secs. 282, 404, 405, 568.

Action tried at Rat Portage, brought to have a contract between the parties declared void, (1) because no by-law was passed authorizing or sanctioning the contract; (2) the contract was not executed by a duly authorized agent of plaintiffs, and (3) the agreement was not drawn, signed or sealed in a way to bind the plaintiffs.

C. A. Masten and A. McLennan, Rat Portage, for plaintiffs.

G. F. Shepley, K.C., and T. R. Ferguson, Rat Portage, for defendants.

The facts sufficiently appear in the judgment.

BRITTON, J.—The defendants purchased the assets of a company which had an agreement with plaintiffs for lighting the streets. The contract was duly completed, and in February, 1895, a new one was made for the electric lighting of the town for 5 years. In August, 1899, tenders were advertised for, and defendants tendered to supply street lighting, etc., for 5 years from February, 1900, and deposited with plaintiffs a marked cheque for \$1,000. The tender was in terms of a draft contract alleged to have been agreed upon by a committee of the council. A meeting of the council was held on September 11th, 1899, and a resolution passed accepting the tender, and authorizing the Mayor and the Clerk to sign the contract as presented in draft. The Mayor

was absent, but the Acting Mayor, and the Clerk signed it at the meeting, and the plaintiffs' seal was affixed. The cheque was handed back the next day. On November 13th, 1899, a resolution, reciting the agreement and ratifying its execution by the Acting Mayor, was passed. The minutes of this meeting were read and confirmed at a subsequent meeting, and the corporate seal of plaintiffs attached. Thereafter the contract was acted on by both parties, and was being acted on when this action was brought.

The contract without express enactment would be good under sec. 568 of the Municipal Act. . . . The necessity of a by-law to create liability on the part of a municipal corporation on an executory contract was discussed and decided in *Waterous Engine Works Co. v. Palmerston*, 21 S. C. R. 556, secs. 282, and 480, there in question being secs. 325, and 565, for comparison, of the present Municipal Act. . . . The town there was held not liable, in the absence of by-law, for the price of a fire engine which had not been accepted. The council acted here under sec. 568, and sec. 272 gives the Acting Mayor all the powers of the Mayor. . . . *Bernardin v. Dufferin*, 19 S. C. R. 581, decides that a corporation is liable, on an executed contract, for the performance of work within its power, and which it has adopted, and has had the benefit, though the contract is not under the corporate seal. The contract here is, to all intents and purposes, an executed one. A valid contract in full force was terminated before its expiry, and rights under it abandoned, and the new one has been acted on for 2 years, and defendants changed their position on the faith of its running for 5 years, renewable for 5 more years. The plaintiffs are, I think, bound, as an individual may be, by acquiescence, and are estopped in this action: *Pembroke v. Canada Central R. W. Co.* 3 O. R. 503. The corporation itself is plaintiff, not a ratepayer, and its not passing a by-law looks like bad faith. In 1900, and 1901, by-laws were passed for raising by taxation, in addition to other moneys, sums to pay defendants under the contract, and this could only be done by by-law: Secs. 404, 405 of the Act. These by-laws lawfully ratified the contract: *Robins v. Brockton*, 7 O. R. 48. The action is dismissed with costs. The defendants are entitled to a declaration that, as between them and the plaintiffs, the contract is a valid and binding one, and that plaintiffs must carry it out in all respects.

McLellan /& Wallbridge, Rat Portage, solicitors for plaintiffs.

T. R. Ferguson, Rat Portage, solicitor for defendants.

JANUARY 17TH, 1902.

DIVISIONAL COURT.

DODGE v. SMITH.

Estoppel by Deed—Mines and Minerals—Possessory Title against Patentee — Subsequent Reservation of Minerals in Grant by Patentee—Effect of—Surface Possession—Notice—Evidence.

Appeal by defendants from judgment of LOUNT, J., in action to restrain defendants from trespassing upon lot 17, in the sixth concession of the township of Bedford, in the county of Frontenac, and digging for or removing any minerals therefrom. In 1864, the Crown granted the lot to Edwin Dodge, Dodge registered the deed in 1866, and in 1877, conveyed to his son Edwin G. Dodge. In 1884, Edwin G. Dodge conveyed to Patrick Murphy, by deed containing a clause, saving and excepting all mines, minerals, and ores. Murphy made a mortgage for the balance of the purchase money to Dodge, which contained a clause "saving and excepting the mines, which said mortgagor has no claim to." The plaintiffs claim the minerals under the will of Edwin G. Dodge. The defendants' title is derived through Murphy. The trial Judge found that P. Murphy had been in possession for two years prior to the deed to him from Dodge; that the lot had been fenced in for upwards of ten years either by P. Murphy, or his brother J. Murphy who had been in possession as a squatter for eight years, and who had then left it; that P. Murphy went into possession as a squatter, and remained there for ten years before the deed to him from Dodge; but that Murphy's conduct in dealing with the grantee of the Crown, Dodge, in receiving the deed from him, and giving him the mortgage with the reservations, and in not asserting at any time a title by possession, disentitled him now, through his representatives, to assert it; that the deed and mortgage read together operated to estop him and them from claiming title to the minerals; that when P. Murphy sold, his conveyance and the subsequent conveyances excepted the minerals, and if not estopped against the grantee of the Crown, he and they are estopped against those who had notice through the registry office, that P. Murphy made no claim to the minerals.

G. H. Watson, K.C., for appellants.

W. J. McWhinney and S. B. Woods, for plaintiffs.

Judgment of the Court, FALCONBRIDGE, C.J., and STREET, J., was delivered by STREET, J.—At the date of the conveyance of July 10th, 1884, from Dodge to Murphy, and

the mortgage back, the title to the mines and minerals had been extinguished by the possession of Murphy, who had acquired as against Dodge a good title to both land and minerals. If the mines had been revested in Dodge, subsequent possession by Murphy of the surface would not extinguish Dodge's title to the mines: *Seaman v. Vawdrey*, 16 Ves. 390; *Smith v. Lloyd*, 9 Ex. 562. But there is nothing in the conveyance or circumstances which had the effect of revesting the mines in Dodge, or which can estop defendants, claiming under Murphy, from asserting his title down to 1884. When Dodge reserved the mines, he reserved something he had not got, and the reservation did not operate as a grant from Murphy. The statement in the mortgage that Murphy makes no claim to the mines, whatever its effect between the parties in an action between them and their privies, and upon the mortgage, can have no effect in this action. It is evidence merely for plaintiff, but has been shewn to be incorrect: *Carpenter v. Buller*, 8 M. & W. 209; *Ex p. Morgan*, 2 Ch. D. 89.

Appeal is allowed with costs and judgment below reversed with costs.

McWhinney, Ridley, & Co., Toronto, solicitors for plaintiffs.

Watson, Smoke, & Smith, Toronto, solicitors for defendants.

JANUARY 17TH, 1902.

DIVISIONAL COURT.

MATTHEWS v. MOODY.

Evidence—Trial—Jury—Refusal of Trial Judge sua sponte to Admit Evidence—New Trial—Costs—Contract—Rescission of—Evidence in Support of—Rule 785.

Motion by defendants to set aside verdict and judgment for plaintiff for \$235 in an action for damages for breach of a warranty or return of money paid, tried by ROBERTSON, J., and a jury at Pembroke, and to dismiss the action or for a new trial. The warranty was upon the sale of a specific article, a hay press, by the defendants to the plaintiff for \$300. By the contract the property in the article was not to pass until payment in full. The defendants took on account of the purchase price a pair of horses valued at \$235 and gave credit for the \$65 balance. At the trial the defendants asked for a nonsuit because the property did not pass.

A. B. Aylesworth, K.C., for defendants.

W. R. White, K.C., for plaintiff.

STREET, J.—In his statement of claim the plaintiff set out that the defendants had guaranteed the hay press to do good work, and the breach of the guaranty. The defendants denied the breach, and alleged that the breaking of the press was due to unskilful handling. The plaintiff said in one of his letters, which was in evidence, that for 25 days he had tried to make the press work, but that in that time it had only pressed 129 tons of hay, which was only equal to 13 small days' work at 10 tons a day. On cross-examination, it was shewn that plaintiff entered in a book, which he had with him in Court, the quantities of hay he had pressed at each farm he visited. The plaintiff cannot rely on breach of warranty, because the title to the press has never vested in him. He must rely upon the right to rescind the contract after certain trials of the press, and notices given to defendants. This right only arises "if the machine cannot be made to do good work," and the defendants were entitled to have the evidence upon that point submitted to the jury. An important element in determining whether the press could be made to do good work, was the amount of work that it was made to do in the six or seven weeks during which the plaintiff was working it. The plaintiff had written to defendants that the press had been doing good work. The defendants were therefore clearly entitled to the production, by the plaintiff on his cross-examination, of the book containing the entries of amount pressed daily. This, the trial Judge refused to allow. A substantial wrong has been occasioned to the defendants within the meaning of rule 785 by such refusal, the extent and effect of which is unknown, but which might have proved of the highest importance: *Bray v. Ford*, [1896] A. C. 44. There should be a new trial. Costs of former trial and of the motion must be in the action, because the objection to the evidence seems to have been wholly that of the Judge, and not of the counsel against whose client it was tendered.

FALCONBRIDGE, C.J., after setting out in detail what took place at the trial upon the rejection of the evidence:—I think substantial wrong has been occasioned, and there must be a new trial. Costs of former trial and motion to be in the action, the plaintiff's counsel not appearing to have raised or pressed the objection to the evidence.

BRITTON, J.—It seems to me substantial justice will be done by allowing this verdict to stand, notwithstanding the improper rejection of evidence. The evidence given well warrants the findings (1), that the press was not well made, (2) that it was not in good working order when the plaintiff had it, and (3) that plaintiff tried fairly, and in good faith,

to get it to work properly. The plaintiff was to have only one day to try the press. The defendants by their conduct in sending an agent to plaintiff, by suggestion and persuasion, threw him off his guard as to his strict legal position. I think defendants have waived their right to hold plaintiff to the strict letter of the contract, and that they should accept the press. Substantial justice will be done by allowing the verdict to stand.

Motion refused. Costs in the action.

White & Williams, Pembroke, solicitors for plaintiff.

J. G. Forgie, Pembroke, solicitor for defendants.

JANUARY 18TH, 1902.

DIVISIONAL COURT.

BOOTH v. BOOTH.

Mechanic's Lien—Work Done to Houses of Different Owners—Lien Attaches to Interest of Each Owner—Amount may be Proportioned—Recoverable if Proved—Discretion of Master—Interference with—R. S. O. ch. 153, secs. 7 (1), 2 (3).

Appeal by Mary E. Hess and others, served with notice of trial in a summary proceeding to enforce a mechanic's lien, from the judgment of the Master at Belleville, allowing plaintiff's lien. The lien is claimed by plaintiff against property on Ridgeway street, in the town of Trenton, belonging to his wife, and is for a balance due in respect of repairs to the value of \$895.50 done by him to the property in question, and the property adjoining it, both of which are covered by the same roof, but the latter property is owned by the defendant's mother.

The Master found the plaintiff entitled to a lien for \$295.50, and that that amount had been expended by him upon the property out of his own moneys.

T. A. O'Rourke, Trenton, for appellants.

H. L. Drayton, for plaintiff.

Judgment of the Court (MEREDITH, C.J., and BRITTON, J.) was delivered by MEREDITH, C.J.—I think a lien may attach on the land of each owner where the buildings are repaired under their joint contract, as in this case, for one entire price, provided a separate account has been kept. R. S. O. ch. 153, sec. 4, creates the lien, and by sec. 7 it attaches upon the estate of the owner as defined by sec. 2 (3). The Master has properly found that the plaintiff has brought himself within these provisions. The work, etc., was done at the request of the wife, and plaintiff is entitled to a lien on her estate, limited to the amount justly due. The price

may be apportioned. This has been done in the United States: *Butler v. Rivers*, 4 R. I. 38; *Ballou v. Black*, 17 Neb. 389. The Master found that the lien was registered and the action brought within the time limited by secs. 22 and 23, and as there is evidence to support his conclusion, it should not be disturbed. There was also evidence to establish the work done, and the materials furnished for the part of the building which belonged to the wife. The Master's finding should not be disturbed even though he had found the other way on the evidence. It cannot be said he was wrong, and unless it can, his findings should not be set aside.

BRITTON, J., I concur.

Appeal dismissed with costs.

A. Abbott, Trenton, solicitor for plaintiff.

T. A. O'Rourke, Trenton, solicitor for Mary E. Hess *et al.*

BRITTON, J.

JANUARY 18TH, 1902.

CHAMBERS.

RE MOORE.

Will—Conversion—Residuary Legatee.

Application by an executor for advice of the Court, under R. S. O. ch. 129, sec. 39. The testatrix, Abigail Moore, by the first clause of her will, devised her homestead to Mrs. Robert Moore, her son's wife. Subsequent to the execution of the will, the executrix sold the house, receiving some cash, and a mortgage for the balance of the purchase money. By the seventh clause of the will it is provided that, "any money there may be over and above what I have herein mentioned, I give to my nephew, Joseph Mills of Ireland, County of Monaghan."

George Edmison, Peterborough, for executrix.

M. Dennistoun, Peterborough, for Joseph Mills.

BRITTON, J.—Held, that Mrs. R. Moore is not entitled to the mortgage or the money thereby secured upon the house. Held, also, that this mortgage is to go to Joseph Mills under the 7th clause in the will. Held, further, that there is no intestacy as to any part of the estate. Joseph Mills consenting in Court to the erection by executor of a suitable tombstone to the memory of Abigail Moore, order made for erection of same, at a cost not to exceed \$50, and that the cost thereof be allowed to the executor in passing his accounts. Costs of all parties to this application to be paid out of the estate.

Edmison & Dixon, Peterborough, solicitors for executor.

Dennistoun, Peck, & Stevenson, Peterborough, solicitors for Joseph Mills.

FALCONBRIDGE, C.J.

JANUARY 7TH, 1902.

TRIAL.

AITCHESON v. McKELVEY.

Specific Performance—Agent—Fraud—Amendment—Delay.

Action tried at Hamilton brought by administratrix of estate of Ellen Butler, deceased, for specific performance of agreement by defendant, made with one Bowerman, to purchase certain property in the city of Hamilton.

A. O'Heir, Hamilton, for plaintiff.

J. L. Counsell, Hamilton, for defendant.

FALCONBRIDGE, C.J.—The defendant, and his wife, and sister, all admit on cross-examination, that the agreement which he claims to have made with plaintiff's agent, Bowerman, that the necessary money should be raised on mortgage of the property in question, and a lot which defendant had placed in Bowerman's hands, was an agreement with Bowerman, personally, and not with the Butler estate, which they all knew had to get its money. And so they have easily persuaded themselves, that this understanding or arrangement was read out by Bowerman as part of the contract which defendant signed. Issue was joined on October 31st, 1901, and it was not until January 2nd, 1902, that defendant sought to amend charging fraud. It is too late to do so. The defence fails. Judgment for plaintiff with costs.

Staunton & O'Heir, Hamilton, solicitors for plaintiff.

MacKelcan & Counsell, Hamilton, solicitors for defendant.



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VOL. I.

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No. 3.

FERGUSON, J.

JANUARY 20TH, 1902.

TRIAL.

McGARR v. TOWN OF PRESCOTT.

*Highway—Non-repair—Knowledge of by Municipal Corporation—
Time—Negligence—Damages.*

Action tried at Brockville, brought to recover damages for injuries sustained by plaintiff owing to non-repair of a board sidewalk on Ann street, in the town of Brockville.

J. A. Hutcheson, Brockville, and A. A. Fisher, Brockville, for plaintiff.

J. B. Clarke, K.C., and J. K. Dowsley, Prescott, for defendants.

FERGUSON, J.—That the plaintiff sustained serious injury is not disputed, and it is conceded that she was not guilty of contributory negligence. It is also admitted that she gave defendants the notice respecting injury, and of intended action. . . The sidewalk was four feet wide, the planks running crosswise of the walk. One of the planks, about ten inches wide, was missing, leaving a hole across the walk of between six and eight inches in depth. . . The injuries of plaintiff are severe. There is beyond doubt a very serious injury to the sciatic nerve on the right side; some of the professional witnesses being of the opinion that the plaintiff may never recover, others that she may in time, opinions differing as to the length of time. . . Though the professional witnesses were not all of the same opinion, I have no doubt that it is shewn that the injury to the nerve was caused by the fall. . . I find also that the medical treatment was proper. . . The population of Prescott is shewn by its mayor to be about 3,000. Ann street is on one side of the town, and not very thickly built upon, and the traffic was shewn to be not very great, nor yet very small, when the locality is considered. The accident occurred at 8.30 p.m. on July 7th, 1901. . . From the evidence I think the sidewalk was in a dangerous condition from June 29th, 1901. One witness

said that the sidewalk was old 10 years ago, and it is shewn that the scantlings were, in most places, very rotten. . . . I am of opinion that this want of repair existed for such a length of time, that, having regard to all the other circumstances of the case, amongst which are, the population of the town, the fact that the sidewalk was a very old and well worn out one, the situation of the street on which the sidewalk was, the travel upon it, etc., the defendants ought to have known of its state, and should be taken to have had notice of it. The plaintiff sustained the injuries by reason of defendants' negligence, and I assess the damages at \$1,500.

Hutcheson & Fisher, Brockville, solicitors for plaintiff.

J. K. Dowsley, Prescott, solicitor for defendants.

FERGUSON, J.

JANUARY 20TH, 1902.

TRIAL.

BEAM v. BEATTY.

BUNTING v. BEATTY.

Infant—Contract of, to Indemnify—Voidable not Void—Ratification at Majority—Unliquidated Damages—Interest.

Actions tried at St. Catharines, brought to recover damages upon the defendant's bonds, dated in 1893, indemnifying plaintiffs against the purchase of certain stock in the Colorado River Irrigation Co.

G. Lynch-Staunton, K.C., for plaintiff.

C. A. Masten, for defendant.

FERGUSON, J.—*Held*, that the infancy of the defendant at the time of making the bonds rendered them voidable, but not void, and that after becoming of age defendant had ratified them. Judgment in first action for \$495 and costs, and in second action for \$720, but interest cannot be allowed because the losses suffered by plaintiffs sound in damages.

A. W. Marquis, St. Catharines, solicitor for plaintiffs.

F. C. McBurney, Niagara Falls, solicitor for defendant.

FERGUSON, J.

JANUARY 20TH, 1902.

TRIAL.

SHERLOCK v. WALLACE.

Contract—As to Profits on Stock—Evidence of—Deed of Land as Security—Redemption—Stockbroker.

Action brought to compel the reconveyance to plaintiff of certain lands conveyed by him by absolute deed to

defendant as security for any sum which might be found due after the conclusion of certain investments in stocks made by the parties.

FERGUSON, J.—*Held*, that the plaintiff had failed to shew that there was an agreement that the profits, if any, arising upon the stock on hand should go for his benefit.

Crothers & Price, St. Thomas, solicitors for plaintiff.

McCrimmon & Wilson, St. Thomas, solicitors for defendant.

FERGUSON, J.

JANUARY 20TH, 1902.

TRIAL.

VANDUSEN v. YOUNG.

Undue Influence—Parent and Child—Conveyance of Land—Without Independent Advice—For Suitable Support of Parent—Absence of Fraud—Good Consideration.

Action brought to set aside an indenture made in 1900, by plaintiff to defendant, to have the registration vacated, and to recover damages for breach of a verbal agreement by defendant to support and maintain plaintiff suitably on the land. The plaintiff is 80 years of age and cannot read or write, and alleges undue influence, and that she acted without independent advice in executing the indenture by which she agreed to devise the land to defendant in consideration of being supported thereon until her death.

FERGUSON, J.—*Held*, that the plaintiff appeared to be a woman of remarkable clearness of mind, with mental faculties unimpaired, that there had been no fraud on the part of her daughter, the defendant, and that the transaction was supported by good consideration and must stand. Action dismissed with costs.

M. M. Brown, Brockville, solicitor for plaintiff.

Hutcheson & Fisher, Brockville, solicitors for defendant.

BRITTON, J.

JANUARY 21ST, 1902.

CHAMBERS.

RE SMITH.

Infant—Custody of—As between Parents.

Where an order was made in May, 1899, giving the custody of two children to their mother, the Court refused to

interfere with the terms contained in it, it not being shewn that the children were badly treated or their health jeopardized.

E. F. Blair, Brussels, solicitor for the father.

Garrow & Garrow, Goderich, solicitors for the mother.

BRITTON, J.

JANUARY 21ST, 1902.

CHAMBERS.

RE CORNELL.

*Executors and Administrators — Maintenance — Infant — Custody—
Advice—Rule 938.*

Originating notice under Rule 938.

E. R. Hanning, Preston, solicitor for executor.

W. J. Millican, Galt, solicitor for other parties except infants.

J. Hoskin, K.C., Toronto, official guardian.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

TAWSE v. SEGUIN.

Particulars—Further Particulars—Interpleader Issue.

An appeal from order of MEREDITH, C.J., *ante*, p. 14, was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), and it was held that the order on appeal was right in the main, but that there should be no further particulars as to advances or as to settled account, but only as to credits. Costs of appeal to be in the action.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

RE MCINTYRE.

MCINTYRE v. LONDON AND WESTERN TRUSTS CO.

*Executors and Administrators — Directions as to Distribution of
Estate—Setting apart securities to meet annuities—Redemption
of annuity—Consent—Rule 938—Jurisdiction under.*

Appeal by the London and Western Trusts Company, the executors of the will of Hugh McIntyre, deceased, from an order of BOYD, C., in Chambers (21 C. L. T. Occ. N. 380), giving directions to the executors as to the distribution of the estate among the residuary legatees, and as to providing for the payment of annuities bequeathed by the will. BOYD, C., declared that the parties interested in the residue were entitled to have sums set apart to answer the annuities from time to time, as sufficient

assets are in the hands of the executors, or to have sums applied in the purchase of Government annuities in the same way, from time to time, as shall seem most expedient to the Master if the parties differ.

G. F. Shepley, K.C., for the executors, contended that they had a right to complain that the estate was taken out of their hands, and that the Court should not interfere with the administration by them and practically set aside the will, no impropriety being alleged against them.

A. B. Aylesworth, K.C., for David McIntyre.

M. D. Fraser, London, for Hugh McIntyre.

J. Folinsbee, Strathroy, and D. Urquhart, for other adult parties.

F. W. Harcourt, for infants.

Judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.— . . . It is clear that it is only when both the persons whose estate is liable to pay an annuity, and the annuitant consent, that an annuity may be redeemed out of the estate . . . That was the intention of the Chancellor, he tells me, and if the order provides otherwise, it is wrong, and should be varied. . . In other respects the order is substantially right. After realizing what may be necessary to pay debts, etc., the annuitants are entitled to have only such portion of the estate set apart as may be necessary to secure their annuities: *Re Parry*, 42 Ch. D. 570: and the extent of such security is to be determined on the principles laid down in *Harbin v. Masterman*, [1896] 1 Ch. 351; see, also, *Ross v. Hicks*, [1891] 3 Ch. 499. The trustees have on hand securities, proper to be held by them as trustees, amply sufficient to secure all annuities, and leave a surplus presently available for distribution among the persons entitled to the residue, and there is no necessity to convert these securities into money. It will suffice to set apart such of these securities, as at 4 per cent. per annum will produce yearly a sum equal to the particular annuity for which the security is set apart. The questions are proper to be decided on a motion under Rule 938: *Re Medland*, *Eland v. Medland*, 41 Ch. D. at p. 492, decided on the corresponding English Rule. The question in *Re Parry*, *supra*, somewhat similar to this, was raised upon an originating summons. Having outlined the principles upon which the appellants should act, there is no necessity for a reference, and if one is had, its costs must be reserved to be disposed of, after report, by a Judge in Chambers. Order is varied as to costs, and as to redemption of legacies; otherwise

affirmed and appeal dismissed. Costs of appeal out of estate, those of appellants as between solicitor and client.

Stuart, Stuart, & Bucke, London, solicitors for executors.

J. Folinsbee, Strathroy; Fraser & Moore, London; Urquhart & Urquhart, Toronto; Macbeth & McPherson, London; and J. Hoskin, K.C., solicitors for other parties.

Moss, J.A.

JANUARY 21ST, 1902.

CHAMBERS.

RE GIBSON.

Infant—Custody Given to Mother—Pending Action for Alimony—Undertaking to Speed—Access to Infant—Allowed to Father.

Motion by mother, upon return to *Habeas Corpus*, for custody of her infant child 3 years old.

H. J. Wickham, for the mother.

F. C. Cooke, for the father.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

McKENZIE v. McLAUGHLIN.

Discovery — Defamation — Privilege — Mitigation of Damages—Relevancy of Questions on Examination of Plaintiff.

Appeal by plaintiff from order of FERGUSON, J., in Chambers, affirming order of a local Judge at London requiring plaintiff to attend for further examination for discovery and answer questions as to whether he had applied for a reward offered by a township council for killing a dog. Action for slander. The plaintiff alleged that the defendant had spoken of the plaintiff the words "he swore false and could be made jump for perjuring himself"—"he perjured himself and stole money from the township." The defendant did not justify, but denied speaking the words, said that the words, if spoken, did not refer to the plaintiff, set up (5) the circumstances under which certain words (not the same as those charged) were spoken, and (6) pleaded privilege.

The questions related to the reward, and asked whether plaintiff had been paid it, and as to his presence at a meeting of the council, and as to the statements he made at it, and as to the fact of the reward, and as to the times and occasions when the words complained of were spoken.

I. F. Hellmuth, for plaintiff. The questions are not relevant to any of the issues, and when justification is not pleaded cannot be relevant, except as to damages, and as no facts are pleaded in mitigation of damages, the questions are irrelevant and improper.

C. Swabey, for defendant.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.), was delivered by MEREDITH, C.J.—In the view we take it is unnecessary to consider whether, having regard to Rule 488, it is necessary for a defendant to plead the facts on which he intends to rely in mitigation of damages, assuming the question open since *Beaton v. Intelligencer Printing Co.*, 22 A. R. 99, or whether, if it be not necessary to so plead, it is proper to examine for discovery as to matters affecting damages only, unless and until the notice has been given. There being on this record the defence of privilege, it is impossible to say that the questions asked are not relevant. . . . Appeal dismissed with costs.

McEvoy, Pope, & Perrin, London, solicitors for plaintiff.

Meredith & Fisher, London, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 21ST, 1902.

TRIAL.

WHITE v. McLAGAN.

Will—Construction—Bequest of Interest to Legatee so long as Unmarried or a Widow—Accumulation during Coverture—Valid Limitation—Condition—"Again."

Action by trustees under the will of Joseph Hancock, deceased, for its construction.

A. Bruce, K.C., for plaintiffs.

S. F. Washington, K.C., for defendant J. McLagan.

W. W. Osborne, Hamilton, for infant defendants.

FALCONBRIDGE, C.J.—The material parts of the will, as far as the purposes of this inquiry are concerned, are as follows (for convenience of reference I have numbered the paragraphs):

And as to all the rest and remainder of my said real and personal estate and effects, and any gifts which may become forfeited as aforesaid, upon trust to sell, convey, realize and convert the same into money with all due diligence, and after the death of my said wife and sister respectively, to sell and convey the said dwelling house, premises and lots devised for their benefit as aforesaid, and to invest the said moneys in first-class real estate mortgage security from time to time at such rate of interest as they may think proper.

1. And to divide the residue of said trust moneys and the interest thereon, and accruing thereon, into thirteen equal shares, and I direct the payment of one of such shares of the said interest annually, upon application for such

...

share at Hamilton, to and for each of the following parties, namely: (13) *Jessie Hancock, daughter of my brother, John Hancock; but my will is that the interest payable to the above named female legatees shall be payable to them respectively only so long as they are unmarried, or widows, and that during the coverture of any or all of such female legatees, the interest shall accumulate on her or their shares, while she or they are married, and shall be payable to her or them again, should she or they become a widow or widows, and so on as often as any of such female legatees shall marry and become widows.*

2. And I direct the payment of the said share of interest of William Hancock to be made to his brother, John Hancock, upon condition that he properly cares for and supports and maintains him during his lifetime, and in payment and discharge of his yearly care, support, and maintenance.

3. And in the event of the death of either of the said parties hereinbefore named, as legatees, before or after my death, leaving lawful issue, I give and bequeath his or her share to such issue in equal proportions, and if any of such issue are under twenty-one years of age, I authorize and empower my said executors to apply the money to which he or she may be entitled to or for his or her use and benefit as they may think proper, without the intervention of any guardian on his or her behalf.

4. And upon the death of the last survivor of the said legatees, I order and direct the payment of all principal moneys in the hands of my executors, and belonging to my estate, to the lawful issue of each of the said legatees in equal shares, so that the children of each will receive one share in equal proportions.

5. And in the event of the death of any of the said parties without leaving lawful issue, I direct that his or her share of interest shall be paid yearly, and every year, to the said other parties in the manner hereinbefore mentioned, and that his or her share of principal money shall form part of my estate for distribution and payment in the manner hereinbefore mentioned.

Jessie Hancock, mentioned in clause 13 of paragraph 1, on the 22nd November, 1894, married Alexander McLagan, and he died on the 1st January, 1902, leaving the defendant, Jessie McLagan, his widow, him surviving, and the only issue of the said marriage, the defendants, Ellen Campbell McLagan, born in 1895, and Elsie McLagan, born in 1897.

This will came before the learned Chancellor of Ontario for construction, in June, 1888, when he decided that "the bequest to the female legatees providing for the payment of interest on their shares of the fund to them, only so long as they were unmarried or widows, and that during the coverture of any, the interest shall accumulate, etc., is a valid limitation as distinguished from a condition; and is to take effect according to the terms of suspension used in the case of one who is at present, and was at the date of the will, married, and also in the case of one who shall hereafter marry: *Heath v. Lewis*, 3 De G. M. & G. 956."

The defendant Jessie McLagan received her share of the interest or income from the trust estate up to the date of her marriage, but no sums have been paid to her since that date, and the interest or income which would but for her marriage have been paid to her, has been retained by the plaintiffs, and the amount thereof, with interest which has been received thereon, was, on the 21st day of November, 1901, \$1,406.25, and the plaintiffs are ready and willing to pay such sum, but are in doubt as to whom the same is payable to.

The questions now are :

1. As to who is entitled to the accumulations of income in respect of the share of the defendant Jessie McLagan during her marriage, and whether the same are now payable to her.
2. As to whether the defendant Jessie McLagan is entitled from the date of the death of her husband to the share of the income accruing from that date, which would have been payable to her had she never been married.
3. What disposition is to be made by the plaintiffs of the accumulations on the share of the said Jessie McLagan during her marriage, and of the income payable in respect of such share in the future.

As to question 1, I am of opinion that the words "and shall be payable to her or them *again*," exclude the idea that the widow is entitled to the accumulations. The will was not drawn by a layman, but by a lawyer, and if the intention had been that the accumulations should be paid to the widow, such words as "with the accumulations thereon" would have been inserted.

Further, the word "*again*" indicates being "back in a former position or state; anew; once more as before:" see Murray's new dictionary, *sub verb.*, A. 3, 6; Macaulay's History of England, vol. 2, p. 78, "The principles of the Treaty

of Dover were again the principles of the foreign policy of England."

To declare the defendant Jessie McLagan to be entitled from the death of her husband to the share of the income accruing from that date, is to place her back in her former position had she never married; and this constitutes the affirmative answer to the second question.

As to the third question, the persons who will on the death of Jessie McLagan become entitled to the trust fund under clauses 3 and 4, will become entitled also to the accumulations of income during the period of Jessie McLagan's marriage.

The cases are not of much assistance. They are principally under the Thellusson Act: *Crowley v. Crowley*, 7 Sim. 427; *O'Neil v. Lucas*, 2 Keen 316; *Harbin v. Masterman*, L. R. 12 Eq. 559; [1894] 2 Ch. 184; *Wharton v. Masterman*, [1895] A. C. 186; *Re Travis, Frost v. Greatorex*, [1900] 2 Ch. 541.

Costs to all parties, out of the estate.

Bruce, Burton, & Bruce, Hamilton, solicitors for plaintiffs.

Washington & Beasley, Hamilton, solicitors for defendant J. McLagan.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for infant defendants.

JANUARY SECOND, 1902.

DIVISIONAL COURT.

BIRKETT v. BREWDER.

Mechanic's Lien—Plant Supplied by Contractor—Forfeited to Owner for Breach of Contract—Lien does not Attach upon—R. S. O. ch. 153, sec. 11 (1).

Appeal by plaintiffs from judgment of Judge of County Court of Carleton dismissing the claim of the plaintiffs to a mechanic's lien upon the works of the Metropolitan Electrical Company of Ottawa in respect of materials furnished by the plaintiffs to Brewder and McNaughton, the contractors. The plaintiffs contended that until the work should be completed, it could not be ascertained whether anything would be due to the contractors upon which the plaintiffs' lien could attach, and, therefore, the right of the lien should not have been determined.

The contract between the Metropolitan Co. and Brewder and McNaughton provided that all machinery and other plant, etc., furnished by the latter, was to become the property of the company until the final completion of the work, and

that if, as provided in the contract, the contractors were dismissed, and the company took the work out of their hands, and completed it, such plant, etc., was to remain the property of the company for the purposes, etc., contained in paragraph 10. The contractors were dismissed, and the company are proceeding with the work, and an action brought by the contractors against the company for damages has been dismissed. The County Judge held that nothing was due to the contractors under the contract; and that the lien of plaintiffs attached only upon the 15 per cent. to be retained under R. S. O. ch. 153, sec. 11, which percentage was not to be computed upon the plant taken possession of by the company.

G. F. Shepley, K.C., for plaintiffs.

A. B. Aylesworth, K.C., for defendants.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by MEREDITH, C.J.—The County Judge was clearly right. . . . The language of sec. 11 (1) that the value is to be “calculated on the basis of the price to be paid for the whole contract” can have no possible application to the plant supplied by the contractor to execute the work, and which remains his property (in the absence of special agreement), to be removed by him when the work has been completed. . . . The County Judge was not asked to postpone the trial, so as to await the completion of the work, to see if anything might be due to the contractors . . . and nothing will ever become due to them in any event by reason of the dismissal of their action. Whether or not the judgment in that action is binding on the lienholders, we express no opinion, but this action, in view of the course taken at the trial, ought not to be retried in order to determine the liability of Brewder & Co., because it is almost certain the same result would be reached. Appeal is dismissed with costs.

Christie, Greene, & Greene, solicitors for plaintiffs.

McVeity & Culbert, Code & Burritt, C. Murphy, Latchford, McDougall, & Daly, Code & Beament, all of Ottawa, solicitors for respective defendants.

MEREDITH, J.

JANUARY 21ST, 1902.

CHAMBERS.

RE POWELL v. DANCYGER.

*Division Court—Prohibition—Transfer of Action to High Court—
Lease—Covenant to Leave in Repair—Breach—Damages—Jurisdiction of Division Court.*

Motion by defendants for order transferring action from

10th Division Court in county of York into High Court, or for prohibition. Action to recover \$26, one month's rent, and \$70, the value of two broken glass lights, under a memorandum of letting, in which the defendants agreed to keep and leave the premises in repair.

W. W. Vickers, for defendants.

C. A. Moss, for plaintiffs.

MEREDITH, J.—The Division Court had jurisdiction to award damages not exceeding \$100: see *Talbot v. Poole*, 15 P. R. 99. The right or title to a corporeal or incorporeal hereditament was not involved. The lease was not denied, nor the right to rent questioned: see *Re Moberley v. Collingwood*, 25 O. R. 625. The nature of the equitable defence, if any, is not disclosed, but there is nothing to shew that the Division Court has not ample power to consider and give sufficient effect to it, and has not done so: see R. S. O. ch. 60, secs. 73 & 75. Therefore there cannot be prohibition, nor a transfer for want of jurisdiction in respect of the claim: there is nothing to indicate any want or excess of jurisdiction. If, having regard to the future effect of the covenant to repair, a reasonable claim for reformation of the lease had been made before trial, a transfer might well have been ordered. Although set-off, defence, or counterclaim, may involve matter beyond the jurisdiction, yet some relief may be granted in a Division Court, and it is only when ample justice cannot be done, that a transfer is made: secs. 76, 136, R. S. O. ch. 51, sec. 186. Motion is dismissed with costs.

OSLER, J.A.

JANUARY 22ND, 1902.

COURT OF APPEAL—CHAMBERS.

HUTTON v. JUSTIN.

Trustee—Abortive Sale of Trust Property in Parcels—Sale by Tender—Leave to Bid—Discretion of Court—Tennant v. Trenchard, 38 L. J. Ch. 661, L. R. 4 Ch. 537, distinguished.

Motion by plaintiff for leave to appeal from order of a Divisional (22 C. L. T. Occ. N. 23), affirming order of MEREDITH, C.J.

G. F. Shepley, K.C., for plaintiff.

A. B. Aylesworth, K.C., for defendant.

OSLER, J.A.—No case has been made out. Whether, when a trust estate has been directed to be sold, the trustee, who is also an incumbrancer, shall be at liberty to bid, is a matter resting in the sound discretion of the Court.

Here, a sale by auction in parcels was had, and failed, and the estate has been now ordered to be put up for sale by tender *en bloc*, and it is contended that without first asking for tenders for parcels, or trying some other way, the trustee should not be at liberty to bid for the estate *en bloc*, if the price named by the Court should not be realized on the sale by tender. The rule has not been so stringently laid down: *Tennant v. Trenchard*, 38 L. J. Ch. 661, and L. R. 4 Ch. 537, per the Lord Chancellor, at p. 547. In that case the trustee was not to be at liberty to bid until some attempt had been made to sell, and proved to be abortive. Here the ends of justice—of justice to the parties—do not require a more stringent application of the rule; there having been in fact one sufficient attempt to sell in parcels, which has proved abortive, the Courts below have exercised a proper discretion in making the order in question. Motion is dismissed with costs.

BRITTON, J.

JANUARY 21ST, 1902.

CHAMBERS.

VALLEAU v. VALLEAU.

Will—Construction—Bequest for Life to the Widow—Articles Passing Under—Use in Specie of Furniture—Income.

Thorpe v. Shillington, 15 Gr. 85, referred to.

Originating notice under Rule 938.

E. Douglas Armour, K.C., for plaintiff.

R. C. Clute, K.C., for defendants.

A. L. Colville, Campbellford, solicitor for plaintiff.

G. Drewry, Brighton, solicitor for defendant.

LOUNT, J.

JANUARY 22ND, 1902.

TRIAL.

MASSEY-HARRIS CO. v. ELLIOTT.

Water and Watercourses—Change in Course of Stream by Freshets—Accretion—Reliction—Easement—Riparian Proprietor—Title by Possession.

Interpleader issue directed to try whether at the time the city of Brantford expropriated certain land, that portion in question in the issue was the property of the plaintiffs or defendants, and to determine the proportion in which the \$6,100, fixed by the arbitrators under the Municipal Act, as the value of the land, and paid into Court, is divisible among them.

S. C. Smoke and Grayson Smith, for plaintiffs.

W. S. Brewster, K.C., and A. E. Watts, Brantford, for the defendants.

LOUNT, J.—The contention is occasioned by a change in the channel of the Grand River from the old to the new channel. . . . It was conceded that the plaintiffs' property, which is on the north side of the river, had, when patented, for its southern boundary, the northern boundary of the river as it ran through the old channel, from which was reserved by the patent an allowance, for a tow path or road, one chain in width along the bank, and full access to the shore for all vessels, boats, and persons; and, likewise, that the northern boundary of defendants' land as patented was the southern boundary of the river as it then ran through the old channel. . . . Many witnesses were examined on both sides. . . . I find that the portion of the disputed property lying immediately south of the old channel . . . up to 1874, formed part of the property now claimed by defendants. In that year, or possibly 1875, a heavy freshet of water and ice came down the river cutting a new channel, which, after 8 or 10 years, by successive freshets, became as it now is formed. . . . The intervening land reappears every year. . . . The old channel has been only partly filled up. . . . The change of channels has not been due to the gradual eating away of the south bank of the old channel by the current. . . . The plaintiffs have not established any title by accretion to the land in dispute, and the doctrine of accretion does not apply, nor has reliction been shewn, for there has been no recession of waters from the plaintiffs' land; they reappear as soon as the spring freshets pass away. An island suddenly formed, as here, remains the property of the original owner. . . . The plaintiffs had, at the date of expropriation, as riparian proprietors, a title to the middle thread of the old channel, which is not completely closed up. . . . The reservation of a chain for a tow path, being an easement, does not take from plaintiffs their right in the soil to the middle thread of the old channel: *Kains v. Turville*, 32 U. C. R. 22. . . . The plaintiffs have not shewn "an actual, constant, and visible occupation to the exclusion of the true owners for 10 years:" *McConaghy v. Denmark*, 4 S. C. R. 632: see also *Harris v. Mudie*, 7 A. R. 414; *Griffith v. Brown*, 5 A. R. 303. Cropping the land during the summer is only a new act of trespass: *Coffin v. North American Land Co.*, 21 O. R. 87: and does not make against the owner's constructive possession: *Handley v. Archibald*, 30 S. C. R. 130. . . . I find for defendants on all grounds,

except as to the middle thread of the old channel in front of their land, 12 chains in length, and therefore plaintiffs should get \$100 and defendants \$6,000 of the money in Court. Costs to defendants, as they succeed substantially.

Watson, Smoke, & Smith, Toronto, solicitors for plaintiffs.

Brewster, Muirhead, & Heyd, Brantford, and A. E. Watts, Brantford, solicitors for respective defendants.

ROBERTSON, J.

JANUARY 22ND, 1902.

TRIAL.

SUTTON v. VILLAGE OF PORT CARLING.

Survey—Re-survey to settle Boundaries—Jurisdiction of Lieutenant-Governor-in-Council to Order—Requisites to Confer—Assessing Cost of re-survey on Owners not Interested.

Re Scott and Peterborough, 26 C. P. 36, applied and followed.

Reg. v. McGugan, 19 C. P. 69, distinguished.

Action brought by certain land-owners to have it declared that certain assessments under by-law No. 48 of defendants are illegal and void, and to quash the by-law, and to enjoin defendants from collecting the several amounts levied against plaintiffs under the by-law. The by-law authorizes the levying of \$290.77 to defray the cost of a Government survey of, and planting durable monuments on, certain parts of the Bailey estate, containing 137 acres, divided into 73 lots and parts of lots, to settle the boundaries. The survey was ordered by the Lieutenant-Governor in council at the request of defendants. The defendant Martin is defendants' tax collector.

R. D. Gunn, Orillia, and T. E. Godson, Bracebridge, for plaintiffs.

C. E. Hewson, Barrie, for defendants.

ROBERTSON, J.—There was not sufficient material sent by defendants' council to warrant the general re-survey that has been made. . . . The whole difficulty could have been gotten over by the surveyor establishing the proper line of Bailey street from Joseph street to the Indian River, at a cost of about \$40. . . . I find that no one of the plaintiffs, except Harris, is interested in the re-survey, which was not necessary to fix their respective boundaries. . . . The case comes within the principles laid down in Re Scott and Peterborough, 26 C. P. 36. . . . I am of opinion that the re-survey was not authorized, the requirements, as I

have stated, of the statute R. S. O. 1887 ch. 152, sec. 39, now R. S. O. 1897 ch. 181, sec. 15, not having been complied with, so as to give the Lieutenant-Governor in council jurisdiction to authorize the survey; therefore the survey was illegal, and therefore there is no power to pass the by-law to levy its cost. If there was jurisdiction to authorize the re-survey, it could only be at the cost of the owners of lots in each range or block, or part of each range or block, interested, and not on all lot-owners, whether or not they are interested. Neither has sub-sec. 5 of sec. 38 of ch. 152 (sub-sec. 5 of sec. 14 of ch. 181) been followed, no estimate of the cost having been made. . . . Reg. v. McGugan, 19 C. P. 69, is distinguishable. In that case there was a petition and memorial for a survey of the first concession of a township, but in this case no street, range, or block, or parts of them, were particularized, and I adopt the language of Draper, C.J., in the Scott case, *supra*, where he says: "The powers to tax, confided in councils, can only be exercised in the manner specified by the Act," etc. I refer on this point to Cooper v. Welbanks, 14 C. P. 364. The by-law must be quashed, the injunction made perpetual, and the corporation must pay the costs of the action on the High Court scale. There was no necessity for making the defendant Martin a party, and the action is dismissed against him without costs.

R. D. Gunn, Orillia, solicitor for plaintiff.

Hewson & Creswicke, Barrie, solicitors for defendants.

JANUARY 23RD, 1902.

DIVISIONAL COURT.

BARTLETT v. CANADIAN BANK OF COMMERCE.

Discovery—Examination for, of Local Manager of Bank—Subsequent Examination of Teller Refused.

Appeal by plaintiffs from order of LOUNT, J., in Chambers, affirming order of Master in Chambers refusing an application by the plaintiffs for leave to examine for discovery one Fralick, teller in the branch of the Canadian Bank of Commerce at Ayr. The action is brought to recover from the Bank of Commerce and the Dominion Bank the sum of \$3,000, the amount of a cheque drawn in favour of plaintiffs by one Thamer upon the Ayr branch of the former bank, and indorsed by plaintiffs and deposited by them in the Dominion Bank at Toronto, who indorsed it to the Bank of Commerce, who sent it to their branch at Ayr, where there was no funds for it. It reached Ayr on May 13th last, and was protested on May 15th, and notice of

dishonour sent to plaintiffs. The Dominion Bank, who had credited the plaintiffs with the amount, afterwards charged it back against the plaintiffs, who base their action on the ground that the notice of dishonour was not in time. The plaintiffs have already examined the agent of the bank at Ayr, and now seek to examine the teller, as an officer of the bank, for discovery.

F. Arnoldi, K.C., for plaintiffs. The teller can alone give the discovery required as to the noting of the cheque. *Dawson v. London Street R. W. Co.*, 18 P. R. 223, shews that the teller is an officer of defendants examinable for discovery.

W. H. Blake, for the defendants the Canadian Bank of Commerce. The discretion exercised below should not be interfered with. The fullest discovery had been afforded to plaintiffs. The teller is not an officer: *Ontario Bank v. Shields*, 33 C. L. J. 393.

The Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) delivered judgment at the conclusion of the argument, holding that the order below was right; that there was nothing to examine about; and that *Ontario Bank v. Shields*, *supra*, was well decided. Appeal dismissed with costs.

Arnoldi & Johnston, Toronto, solicitors for plaintiffs.

Blake, Lash, & Cassels, Toronto, solicitors for defendants.

JANUARY 23RD, 1902.

DIVISIONAL COURT.

EVANS v. EVANS.

Will—Executory Devise—Period of Vesting—Attaining Majority and Death of Life Tenant—Double Event Necessary.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action for construction of will of John Evans, deceased. The testator died in 1865, leaving a widow and six sons, and three daughter surviving. Walter Evans, a son of the testator, died intestate without issue on November 2nd, 1899, leaving surviving his widow, the plaintiff. Betsy Evans, the testator's widow, died on February 20th, 1901. The testator devised all his real estate to trustees in trust "to permit and allow my wife, Betsy Evans, to have, use, occupy, and enjoy during her natural life said lot 2 in the fourth concession, East Gwillimbury, with dwelling-house, etc., free of rent or charge except taxes, which are to be paid by her, and from and immediately after her decease,

then, upon trust, I give and devise the said lot, with dwelling-house, etc., unto my son, Walter Evans, aged five years, to be enjoyed by him at the age of 21 years, if my said wife shall then be deceased, but if she shall not, then the same to be enjoyed by him when and so soon after he shall have attained the age of 21 years as my said wife shall die; and I hereby direct my trustees and the survivor of them, and his heirs, to release, convey, and assure the same unto my said son Walter Evans, his heirs and assigns, at the time of the death of my said wife; provided that he, my said son Walter, shall then have attained the age of 21 years; but if shall not have attained that age, I direct my said trustees to so release, convey, and assure the said lot to my said son when and so soon as he shall attain the age of 21 years. . . . If any of my other sons "referring to the testator's sons, except David, should die before the time appointed for him or them to receive his or their share or shares, I direct that his or their share or shares shall be equally divided amongst his remaining brothers, except my son David, who is not to receive in any event the share or shares of any of my said sons who may die before receiving his or their share or shares." The Chief Justice held that the testator meant that Walter should take lot 2 only in the double event of his attaining the age of 21 years and surviving the testator's widow, Betsy.

H. T. Beck, for plaintiff.

J. W. McCullough, for the defendant D. Evans jun., in same interest as plaintiff.

A. H. Marsh, K.C., for other defendants.

The Court was composed of BOYD, C., and FERGUSON, J., both of whom wrote opinions, agreeing in the result.

FERGUSON, J.—The testator fixed a point of time at which his son Walter was to receive a title to the land in question, which was the earliest point of time after he, Walter, should have attained 21 years, and the life tenant, the widow, should be dead. Walter did not survive the widow, and he, therefore, died before the time appointed to receive his share, and the gift in the subsequent clause sprang up upon the death of Walter of its inherent strength, and he had not, and the plaintiff cannot through him have, any vested rights to the land. Judgment below affirmed with costs.

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BRITTON, J.

JANUARY 23RD, 1902.

TRIAL.

BANK OF OTTAWA v. LEWIS.

Partnership—Authority of Partner—Bill of Exchange—Notice.

Creighton v. Halifax Banking Co., 18 S. C. R. 140, followed.

Action to recover amounts of two bills of exchange drawn by defendant McGregor, in the name of the firm of Lewis & McGregor, upon Vipond, Peterson, & Co, in favour of the plaintiffs.

The defendants were partners in the auction and commission business in fruit, and each had, besides, a separate business of his own. The defendant Lewis had a private bank account with Molsons Bank in Ottawa, and McGregor kept one with plaintiffs.

J. Christie, Ottawa, and Wentworth Green, Ottawa, for plaintiffs.

W. Wyld, K.C., and Glyn Osler, Ottawa, for defendants.

BRITTON, J.—The bills were drawn upon blanks furnished by plaintiffs, and, although drawn to their order, were indorsed by McGregor in name of Lewis & McGregor, and also by McGregor individually. They were discounted by the plaintiffs for McGregor, and the proceeds placed to his private account, and checked out by him. . . . The partnership was not registered. The partners agreed that Lewis was to use his private account for firm purposes. The business was to be conducted on a cash basis, practically, and the only authority McGregor had was to accept drafts for goods bought and received by the firm, and to make the drafts payable at Molsons Bank, where they were to be paid by Lewis. . . . The plaintiffs were not notified of the limitations of McGregor's authority. . . . I find as to the first bill (1) that Lewis did not authorize McGregor to draw in the firm name; (2) that the proceeds were placed to McGregor's account and drawn out and used by him to carry out his own purposes, and for purposes which Lewis did not desire, and used so without his knowledge; (3) that Lewis

never gave plaintiffs to understand that McGregor had any authority to use the firm name to obtain money to be placed to his own credit, or for his own purposes, and that such authority was never given; and (4) that there was nothing in the former dealing between the plaintiffs and McGregor to warrant them in believing he had such authority. This brings the case within *Creighton v. Halifax Banking Co.*, 18 S. C. R. 140, and plaintiffs cannot recover on the first bill. The case as to the second bill is in a different position. On the conflict of testimony between the partners, I have come to the conclusion that Lewis knew of the bill, assented to it, and received from McGregor its proceeds, and is liable.

Judgment accordingly.

Christie & Green, Ottawa, solicitors for plaintiffs.

O'Gara, Wyld, & Osler, Ottawa, solicitors for defendants.

FERGUSON, J.

JANUARY 27TH, 1902.

CHAMBERS.

McCAULEY v. BUTLER.

Solicitor—Costs—Collusive Settlement of Action—Notice of Lien.

Sanvidge v. Ireland, 14 P. R. 29, followed.

Appeal, by solicitor for plaintiff, from order of local Judge at London dismissing application of the solicitor for payment of his costs out of the fund arising upon a settlement of the action, and paid over between the parties behind the back and against the notice of the solicitor.

G. C. Gibbons, K.C., and P. H. Bartlett, London, for solicitor.

A. B. Cox, London, for defendant.

FERGUSON, J.—Action for criminal conversation, being brought for trial at London. The parties resided at Lucan, 12 or 14 miles from London, Ontario, where their solicitors resided. On December 14th, 1901, defendant sent a messenger to his solicitor to inform him of the intended settlement. The messenger was at once referred by him (Mr. Meredith) to Mr. Toothe, the plaintiff's solicitor. Mr. Toothe thereupon telephoned to Mr. Meredith and said: "I understand there has been another settlement, and I will look to your client, and to every person who had a finger in this settlement for my costs, and to this man Butler, who, I always understood, was good. I gave him fair warning and notice that my costs had not been paid." The messenger returned the same day to Lucan, and the settlement was carried out on Monday 16th December. . . . The

plaintiff has little or no property. The defendant is a man of substance. The appeal was very learnedly and with much force argued on each side. . . . The word "lien" was not used over the telephone, but the clearest kind of statement was made that plaintiff's solicitor would look to the defendant for his costs of action. The claim so made could, in the circumstances, rest upon no other footing than a lien, and as between solicitors the words used were sufficient. They go much further than those used in *Sullivan v. Pearson*, L. R. 4 Q. B. 153, 38 L. J. Q. B. 65; besides, that case was not determined on the letter. Thus there was notice on the 14th of the month to defendant's solicitor of the lien claimed. . . . I am precluded by what I said in *Sanvidge v. Ireland*, 14 P. R. 29, from holding that notice to the solicitor was not notice to the defendant. . . . In *Boursot v. Savage*, L. R. 2 Eq. at p. 142, Kindersley, V.-C., says: "It is a moot question upon what principle this doctrine rests," and "my solicitor is *alter ego*; he is myself." I allow the appeal. Defendant is to pay plaintiff's solicitor his costs of the action between solicitor and client, the costs of the motion and the costs of this appeal, all are to be taxed, and paid forthwith, thereafter. Thomas Hodgins and John Fox were not properly made parties. . . . I give no costs against them, nor to them.

R. M. C. Toothe, London, solicitor for plaintiff.

E. Meredith, London, solicitor for defendant.

Moss, J.A.

JANUARY 27TH, 1902.

CHAMBERS.

Re HOLLAND.

Will—Legacy Duty—Discretion of Executors to Pay out of Residue—Executors may, before a Year from Death of Testator, Credit Amount of a Legacy on Mortgage, Payable at any Time, Given by Legatee, if Satisfied of Sufficiency of Assets—Legatee Predeceasing Testator—Lapse.

Manning v. Robinson, 29 O. R. 483, approved.

Motion by widow of a testator and one of his executors under Rule 938, for advice of the Court.

The testator directed his executors to pay his just debts, funeral and testamentary expenses, and, after giving certain legacies, devised the residue of his estate.

R. C. Clute, K.C., for applicants.

R. U. McPherson, for residuary legatee.

Moss, J.A.—The legacy duty is properly deducted from the legacies, and should not be paid out of the residue, and the executors have no discretion to pay such duty out of the residue: per ARMOUR, C.J., in *Manning v. Robinson*, 29 O. R. 483. There is nothing affording any reason for saying that the executors were bound to pay the pecuniary legacies, or any of them, before the expiration of one year from the testator's death. Therefore, none of the pecuniary legacies bear interest from the testator's death. As M. T. Herrington is entitled to pay off any portion of the principal money of her mortgage at any time, there was nothing to prevent the executors, if satisfied of the sufficiency of the funds in their hands for other purposes, from exercising their discretion in favour of paying her legacy by crediting it against her mortgage, before the expiration of one year from the testator's death. The legacy of \$200 to William Purvis, who died some days prior to the decease of the testator, intestate, and left surviving several children, lapsed. Costs out of the estate.

S. J. Young, Trenton, solicitor for executors.

McEvoy & Perrin, London, solicitors for residuary legatee.

FERGUSON, J.

JANUARY 27TH, 1902.

TRIAL.

CANADIAN BANK OF COMMERCE v. TOWN OF TORONTO JUNCTION.

*Municipal Corporation—Not Liable for Costs of Advertising Tax Sale
Ordered by Treasurer—Absence of By-law or Resolution of
Council—R. S. O. ch. 224, sec. 224.*

Warwick v. County of Simcoe, 36 C. L. J. 461, approved.

Action to recover \$462.50, amount of a bill of the York Leader & Publishing Co. for advertising a sale of lands for arrears of taxes. The company assigned the claim to plaintiffs.

W. H. Blake, for plaintiffs.

C. C. Going, Toronto Junction, for defendants.

FERGUSON, J.—Mr. Jackson, the treasurer of defendants, indorsed on the letter of March 5th, 1900, notifying him of the assignment to the plaintiffs, as follows:—"Whatever amount may become due to the 'Leader & Recorder' for advertising tax sale for 1900, will be paid by me to the Canadian Bank of Commerce." . . . On September 29th,

1900, the plaintiffs wrote asking payment, to which request Jackson replied that nothing was due. On March 4th, 1901, this action was begun, not against the treasurer, but against the corporation. There has not been any by-law or resolution of the council regarding this matter, nor has the town made any contract in respect of it. . . . R. S. O. ch. 224, sec. 224, provides for the purposes of collection of taxes that the treasurer and mayor of a town shall perform, upon its incorporation, the like duties as are in the Act, before, in the case of other municipalities, imposed on the county treasurer and warden respectively. In this case the warrant was issued by the mayor of the town. . . . I entirely agree with the judgment of the Judge of the County of York in *Warwick v. County of Simcoe*, 36 C. L. J. 461. Under sec. 224, the treasurer is an officer pointed out by the legislature, and commanded to perform certain duties for the general good, and in neither case can the municipality interfere with the officer in the performance of those defined duties. The treasurer in the present case did not at any time attempt to pledge the defendants' credit, and he had no power to do so, and they are not liable. Action dismissed with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiffs.

C. C. Going, Toronto Junction, solicitor for defendants.

MACMAHON, J.

JANUARY 27TH, 1902.

TRIAL.

DUNN & CO. v. PRESCOTT ELEVATOR CO.

Railment—Warehouseman—Negligence of—Loss of Corn Stored in Elevator from Heat—Measure of Damages.

Action tried at Ottawa, brought to recover damages for alleged negligence, want of skill, and improper conduct of defendants in storing, warehousing and taking care of 50,000 bushels of corn, ex steamer *Niko*, and 62,300 bushels, ex steamer *Nicaragua*, to arrive at defendants' elevator in April, 1897, composed of old hard, dry corn, No. 3.

J. Leitch, K.C., for plaintiffs.

J. A. Hutcheson, Brockville, for defendants.

MACMAHON, J.—The duty of a warehouseman is stated in *Beven on Negligence*, 2nd ed., p. 999. See *Snodgrass v. Ritchie*, 17 *Rettie* 712; *Brabant v. King*, [1895] A. C. 632, at p. 640; *Powers v. Mitchell*, 3 *Hill (N.Y.)* 545. . . . The defendants had ample facilities for turning over the

corn, and expressed their intention so to do, and had they carried it out the corn would have been preserved in good condition. . . . None of these employed by defendants were experienced in the work of taking care of grain in an elevator except one, and, although directions were given by plaintiffs in their telegrams and letters of May 22nd, 26th, and June 2nd and 3rd, to keep the corn turned, which could be done at the rate of 6,000 or 8,000 bushels an hour by transferring from one bin to another, and for which the company had ample facilities, this duty was neglected, and it was not turned over between May 22nd and June 4th. The measure of damages is the difference between what the corn was worth, and would have realized at Prescott on June 15th, had it been in perfect condition, viz., 27 cents a bushel, and what it was worth there and could have been sold for in its damaged condition.

Leitch & Pringle, Cornwall, solicitors for plaintiffs.

F. J. French, Prescott, solicitor for defendants.

ROBERTSON, J.

JANUARY 27TH, 1902.

TRIAL.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Contract—Delivery of Deed in Escrow—Non-performance of Condition—Option—Trust.

Action tried partly at Barrie and concluded at Toronto, brought to recover \$3,122.50.

J. K. Kerr, K.C., and R. D. Gunn, Orillia, for plaintiff.

John Greer, for defendant bank.

W. H. Blake, for defendant Trading Corporation.

ROBERTSON, J.—I find as facts, on the evidence, that plaintiff in all respects fully and completely performed his agreement, dated June 23rd, 1898, for the sale of certain mining properties to A. J. Mangold, acting for defendant corporation, after inspection of and examination of title, etc., to the claims; that after inspection and putting a man in to work the claims as he saw fit, and paying five per cent. of the purchase money, Mangold requested plaintiff to execute bills of sale and deposit them with the manager of Bank of British North America, Dawson Branch, accompanied by a letter to him dated October 8th, 1898:—"We beg to deposit with you this day two bills of sale from R. A. Harris to A. J. Mangold . . . the said deeds to be

held by you in escrow, and to be forwarded by you to your branch in London, England, to be so held until April 7th next, when they are to be returned to your branch in Vancouver, to be delivered by them to R. A. Harris, or his order, unless on or before said 7th day of April there be deposited to his credit in your branch in London, England, the respective sums of \$3,122.50, when the deed of sale regarding 76 A on Hunker is to be delivered to Mr. Mangold, or his order. . . . If the said amounts be paid before 7th day of April next, you will please instruct your branch in London to forward same to your agency in Vancouver, to be paid over immediately to the order of Mr. Harris. R. A. Harris, A. J. Mangold." On 7th April, 1899, Mangold wrote the following letter to secretary of the bank in London:—"Referring to the bill of sale held by you on behalf of Mr. R. A. Harris of a part share of the claim 76 A Hunker, and which document is to be handed over to me or my order on payment of \$3,122.50, I now hand you the equivalent of this sum, but, inasmuch as the bill of sale is not accompanied by any documents verifying the title to the property, I must request you to hold the money in escrow, either here or at Vancouver, until the manager of the Pioneer Trading Corporation of Klondike, on behalf of which company I negotiated this option, is satisfied that the title is correct, when the money can be handed over to Mr. Harris in exchange for a properly executed bill of sale, for which the manager's receipt shall be your full and sufficient discharge." Under these circumstances, I find that the \$3,122.50 was not paid to the credit of the plaintiff as required by the letter of the 8th October, 1898, and therefore the plaintiff had no cause of action against the bank, and, as the bill of sale was sent by it to Vancouver, there was no breach of trust. . . . Upon the execution of the letter of the 8th October, 1898, the option to purchase was at an end, and the agreement to buy complete to be carried out, and consummated by the payment six months later of the \$3,122.50, and neither Mangold or the corporation had a right to withdraw, and had no other step been taken, the plaintiff was in a position to sue for specific performance and recover the \$3,122.50. If not, the plaintiff, in order to save his title, would, according to the mining regulations, have been obliged to have gone on to the claim and done representation work during the whole of the six months allowed for payment of the balance of the purchase money; whereas, in fact, the corporation went into possession and

did that work, and nothing was said to plaintiff as to anything being unsatisfactory until the letter of April 7th. 1899. . . . The cases do not support the contention that the option to purchase extended up to the end of the six months from October 8th, 1898. I dismiss the action with costs as to the bank. who may deduct their costs out of the fund of \$3,122.50 in their hands. I give judgment for plaintiff for balance of fund, and direct the defendant corporation to pay to plaintiff his costs and the costs deducted by the bank.

R. D. Gunn, Orillia, solicitor for plaintiff.

Smith, Rae, & Greer, Toronto, solicitors for Bank of British North America.

Blake, Lash, & Cassels, Toronto, solicitors for Pioneer Trading Corporation.

JANUARY 29TH, 1902.

DIVISIONAL COURT.

WOLFF v. KEHOE.

*Statutes—Highway—Trees, etc., "Left Standing" on—Meaning of—
R. S. O. ch. 243, sec. 2, sub-sec. 4.*

Appeal by plaintiff from judgment of County Court of Carleton.

Glyn Osler, Ottawa, for plaintiff.

R. V. Sinclair, Ottawa, for defendant.

The Court (MEREDITH, C.J., LOUNT, J.) held, in disposing of the appeal, that R. S. O ch. 243, sec. 2, sub-sec. 4, which enacts that "every growing tree, shrub, or sapling, whatsoever planted or left standing on either side of any highway for the purposes of shade, or ornament," etc., means growing tree, etc., left standing *by a municipality*.

O'Gara, Wyld, and Osler, Ottawa, solicitors for plaintiff.

Caron & Sinclair, Ottawa, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 27TH, 1902.

TRIAL.

HAGAR v. HAGAR.

*(Contract—To Build Walls of Barn—Good and Workmanlike Manner
—Contractor not Liable if Roof Causes Walls to Fall—Plan—
Costs.*

Action tried at Hamilton, brought to recover damages by reason of the loss to plaintiff from the negligent construction by defendant of the walls of concrete of a barn to be

erected by him for plaintiff, and which plaintiff alleges defendant guaranteed would be done in a skilful and workmanlike manner.

S. D. Biggar, Hamilton, and W. S. McBrayne, Hamilton, for plaintiff.

W. M. German, K.C., for defendant.

FALCONBRIDGE, C.J.—The turning point is, who is responsible for the construction of the roof? The work of building the wall was done in a good and workmanlike manner, and the wall would have stood any vertical pressure which could fairly have been imposed on it, but no such wall could resist the outward pressure or “thrust” of a roof constructed as the one in question. . . . This is a case of hardship, while the result is, as a matter of law, that plaintiff cannot claim to have relied on defendant’s plan, yet it probably contributed to the accident; therefore I shall not give costs against the plaintiff. Set-off of amount for extra work against plastering and pointing still to be done. Judgment for defendant for \$230, balance of contract price, without costs.

Biggar & McBrayne, Hamilton, solicitors for plaintiff.

German & Pettit, Welland, solicitors for defendant.

LISTER, J.A.

JANUARY 29TH, 1902.

COURT OF APPEAL—CHAMBERS.

HUNTER v. BOYD.

Leave to Appeal—Matter of Public Interest—Construction of Statute
—R. S. O. ch. 129, sec. 11.

Motion by plaintiff for leave to appeal from order of a Divisional Court, reversing order of LOUNT, J., appointing an administrator *ad litem* to estate of defendant Boyd, deceased.

G. G. S. Lindsey, K.C., for plaintiff.

R. McKay, for defendants.

LISTER, J.A.—Action for damages for malicious prosecution. The Divisional Court held that in an action such as this such an administrator is not included within the description “administrators” in R. S. O. ch. 129, sec. 11. I think there is jurisdiction to entertain the motion. The question whether LOUNT, J., had jurisdiction, under the circumstances here, to appoint such administrator, depends upon the construction of sec. 11, and, having in view the

differences of opinion on the part of the Judges before whom the question has come, and that the construction of this section is, as affecting other than the parties to this litigation, a matter of public interest, a further appeal should be and is allowed upon security being given. Costs of motion to be in the appeal.

Lindsey & Wadsworth, Toronto, solicitors for plaintiff.

Beatty, Blackstock, Nesbitt, Chadwick, & Riddell, Toronto, solicitors for defendants

JANUARY 30TH, 1902.

COURT OF APPEAL.

McKENZIE v. McLAUGHLIN.

Leave to Appeal—Special Circumstances — Discovery—Amendment after—Practice.

Motion by plaintiff for leave to appeal from order of a Divisional Court, *ante*, p. 58.

I. F. Hellmuth, for plaintiff.

G. F. Shepley, K.C., for defendant.

At the conclusion of the argument the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, J.J.A.)—*Held*, that this was not a case of character or importance warranting the granting of special leave to appeal; that no real harm or prejudice would arise to plaintiff by his answering the questions; and that the constant practice is to amend the defence according to what is brought out on examination for discovery. Motion dismissed with costs.

ROBERTSON, J.

JANUARY 31ST, 1902.

CHAMBERS.

HUNT v. ROBINS.

Judgment Debtor—Examination—Making Away with Property—Committal—Rule 907.

Metropolitan Loan, etc., Co. v. Mara, 8 P. R. at p. 360, followed.

Motion by plaintiff to commit defendant Alson Robins under Rule 907.

Charles Millar, for plaintiff.

J. A. Keys, St. Catharines, for defendant Alson Robins.

ROBERTSON, J.—The defendant owned lands in Buffalo and Tonawanda, U. S. A. On the morning after the entry of judgment in this action, the defendant sent his mother to Buffalo and Tonawanda, and she sold both of properties, and advised him by telegraph. He says that the Tonawanda property, for which, in 1898, he gave \$600, is in litigation, and he was anxious to get rid of it, so he sold it for a safe valued at \$100, which he left in the purchaser's possession, who still owes him \$400 for balance of purchase money. When asked if the safe was worth more than \$5 or \$10, he replied, "I took the man's word for it." The property in Buffalo was sold for \$1,600, and he says, "after paying the necessary expenses and interest I got \$75 out of it." He states that the only means he has of paying the judgment is the lease and license of a saloon in St Catharines, Ontario; and that he sold his other properties for the purpose of defecting this judgment. Pending an adjournment with a view to settlement, the goods in the saloon and premises were sold for \$700 under the execution issued by plaintiff, but defendant's wife established a claim before the County Judge of Lincoln, under the Creditors' Relief Act, for \$1,000, and plaintiff has received only \$91 on his claim for \$1,435.59. It was objected that property in the U. S. A. is not exigible under execution here, because out of the jurisdiction. I do not think there is anything in the objection. It is clear defendant endeavoured to make away with those properties, to defeat or defraud the plaintiff, and being a resident of this Province, whatever he got for them he brought here, except the safe, which he never took into his possession. I am satisfied that these properties have not been rightly or legally dealt with by him, and he has not accounted for the proceeds, if he ever received anything, in a business-like way . . . I have no doubt that he has concealed or made away with his property in order to defraud the plaintiff. If I make the order asked for, it would amount to a sentence for a criminal offence: *Hobbs v. Scott*, 23 U. C. R. *per* DRAPER, C.J., at p. 622; and defendant cannot be relieved from it for 12 months: *Jones v. Macdonald*, 15 P. R. 345. I am unwilling therefore to make the order without giving defendant a further opportunity to see if some arrangement cannot be made between the parties: *Metropolitan Loan and Savings Co. v. Mara*, 8 P. R. *per* Wilson, C.J., at p. 360. I shall therefore allow a fortnight for further negotiation, but I hope I shall not be required to make an order.

BRITTON, J.

FEBRUARY 1ST, 1902.

TRIAL.

PATTERSON v. TURNER.

Company—Agreement to Subscribe for Stock—Delay in Carrying out Objects of Company—Repudiation of Agreement—Judgment in Undefended Action against Company by Subscriber—Effect of—R. S. O. 1887 ch. 157, sec. 4—R. S. O. ch. 191, sec. 9.

Action by plaintiffs, suing on behalf of themselves and all other subscribers to an agreement to take stock in the Hotel Brant Co., to recover from defendant Turner \$600, the amount of the par value of twelve shares which he agreed to take.

A. B. Aylesworth, K.C., and G. H. Levy, Hamilton, for plaintiffs.

G. Lynch-Staunton, K.C., for defendant Turner.

S. F. Washington, K.C., for defendant company.

BRITTON, J.—On 28th January, 1899, Turner signed the stock book of the proposed company, containing an agreement to take the number of shares set opposite the names of subscribers, and a covenant by the subscribers with each other to pay the amounts, when called in by the directors of the company, and to abide by the by-laws, etc., and, further these words, "no subscription to be binding until \$40,000 has been subscribed hereon." The stock book also contained a prospectus stating the object of the company to be the acquiring of the Brant House property at Burlington, and the erection of a summer hotel, at once, so as to be ready for the summer season of 1899. The first subscription was made on 17th November, 1898. The defendant signed on 28th January, 1899, and others subscribed, in all, to the amount of \$28,700 up to 29th March, 1899. Nothing further was done until October, 1899, when the plaintiff became interested, and on the 24th of that month signed the agreement in the stock book, and others subsequently signed, until the amount subscribed became \$40,150. Letters patent issued on 24th November, 1899, fixing the capital stock at \$50,000. The hotel was completed about the 1st July, 1900. In an undefended action the defendant obtained a judgment against the company declaring that he never was a shareholder. There is an important difference in the wording of R. S. O. 1897 ch. 191, sec. 9, and the earlier Act, R. S. O. 1887 ch. 157, sec. 4, as to who become shareholders. If the agreement to subscribe, signed by defendant, was produced and accepted by the Governor-in council as an agreement "in its

essential features," complying with the former Act, 1897, then by sec. 9, the persons named in the agreement were constituted the body corporate, and if this had been shewn, the result of the action might have been different. I think that the judgment does not, in itself, afford any defence in this action. But this action is not against defendant as a shareholder. It is simply an action upon his agreement, to compel him to accept the shares, and pay for them: see *Ridwelly Canal Co. v. Raby*, 2 Price 93. The difficulty, however, fatal to the plaintiffs' recovery here is, that they did not subscribe within a reasonable time after defendant and others had become parties to the agreement. Without fixing a day limit, I think that in order to make the agreement operative and binding upon any one to the others, the whole undertaking should have been proceeded with within a reasonable time from its inception. Upon the facts before mentioned, this was not done, and I am not able to find that at any time after 1st October, 1899, defendant Turner agreed to be bound by his subscription, or approved and agreed to proceeding with the work, as it was afterwards done, nor that plaintiffs signed the agreement in the stock book, relying on defendant Turner's approval and consent. It can hardly be said in face of defendant's letter of 13th December 1899, that he stood by and allowed plaintiffs to suppose that he consented. Action dismissed with costs.

Washington & Beasley, Hamilton, solicitors for plaintiffs and defendant company.

J. J. Scott, Hamilton, solicitor for defendant Turner.

BRITTON, J.

FEBRUARY 1ST, 1902.

TRIAL.

ROBINSON v. MCLEOD.

Trade Mark—Infringement—Trade Union—User by Non-members—Right of.

Action by plaintiff as organizer and general secretary of the Journeymen Tailors' Union of America, on behalf of himself and all other members of the union, to restrain defendant, his workmen and agents, from using or offering for sale any clothing, having attached or fastened upon it, any label or mark, being an imitation, counterfeit, or copy, or fraudulent or colourable imitation of the specific trade mark, registered, alleged to be the property of the plaintiff, and the other members of this union, and from in any way infringing his trade mark, and for damages.

H. Carscallen, K.C., and D'Arcy Tate, Hamilton, for plaintiff.

H. H. Bicknell, Hamilton, for defendant.

BRITTON, J.—The trade mark was registered in October, 1897, to be applied to the sale of clothing. The union is a voluntary unincorporated association of practical tailors, and was formed, and is continued, for promoting, among other things, the mental and physical welfare of its members, to aid in maintaining a high standard of workmanship, and to assist its members to obtain fair wages, etc. The defendant is not a member. The trade mark has been used since 1883, and has on it that date. It is admitted that the owners of the trade mark have no proprietary interest in the goods or garments to which the label or mark is to be attached. In the view I take of the case, I am obliged to give my decision upon the facts proved or assumed to be proved, and I purposely refrain from discussing whether there is any right to a trade mark independent of and disconnected from a business, and whether the specific trade mark is within the Dominion Trade Mark and Design Act, so as to entitle plaintiff to any protection against persons who may choose to use a similar mark. . . . One of the labels or marks used by defendant was once used by a union not now existing, and formerly in the city of St. Thomas. There is no evidence of calling in their labels, but at all events their label is not an imitation, much less a false and fraudulent imitation, of plaintiff's label. . . . The other labels plaintiff had are genuine. The plaintiff issues labels to tailors in good standing in the union, and that give these men a right to use the labels. They are for the protection of union men, and if the men use the labels improperly, and against the interests of the union, that is a matter for the union to consider in dealing with its members, but an employer, who is not a member, cannot be restrained from dealing with union men, or from putting a genuine label upon union work.

The objects of the union are laudable, and so long as the attainment of these objects is sought in a proper way, and without infringing upon any other person's rights, there can be no complaint. *Quinn v. Leathem*, [1901] A. C. 495, is instructive as shewing that labour unions may go too far in attempting to interfere with persons who are not members. If defendant did, fraudulently and deceitfully and with intent to injure the workmen, or any of them, represented by plaintiff, sell to defendant's customers an inferior article,

as to material and workmanship, and if, to accomplish this, he improperly made use of a genuine label, I would hold him answerable, but nothing of the kind was proved, nor can be inferred from the evidence: see *Clark Thread Co. v. Armitage*, 67 Fed. R. 896. I find that the allegations of plaintiff are not sustained by the evidence; that there was once a Journeymen Tailors' Union of Canada, which had a label, although not registered as a trade mark; and that there is no evidence that defendant had knowledge that the local union at St. Thomas had ceased to exist, if, in fact, it did cease. Action dismissed with costs.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

H. H. Bicknell, Hamilton, solicitor for defendant.

FEBRUARY 1ST, 1902.

DIVISIONAL COURT.

RE YOCOM, HONSINGER v. HOPKINS.

Administration — Insolvent Estate—Creditors—Conduct of Proceedings—Discretion of Court, etc.—Rule 954.

Re Squire, 21 Ch. D. 647, referred to.

Where a creditor had been appointed administrator of an insolvent estate, and had realized \$1,045 for the personalty; and it was shewn that the real estate was not worth the amount of the mortgages against it, and that the claims sent by creditors amounted to \$3,450, of which \$1,915.45 was claimed by a surety for the mortgage debt, as the amount of his probable loss, LOUNT, J., in the exercise of his discretion, under Rule 954, refused an administration order, because a sale of the mortgaged land was pending, and the result would so largely diminish the difficulty of winding up the estate.

On appeal.

W. J. Treemear, for the plaintiff.

F. E. Hodgins, for defendant.

A Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.)

Held, that, as the plaintiff and the surety were entitled to litigate; as administration would settle these and all other questions at less expense; and as the mortgage sale had in the meantime proved abortive, and thus not decreased the difficulty of winding up the estate; that an administration order should be made, but without costs of

appeal, except that both parties might include their disbursements, as part of their disbursements in the administration proceedings.

The conduct of the reference was given to the administrator, because he was chosen by the creditors, and the plaintiff's claim was only \$102.40, referring to *Re Swire*, 21 Ch. D. 647.

J. A. Robinson, St. Thomas, solicitor for plaintiff.

J. C. Eccles, Dunnville, solicitor for defendant.

OSLER, J.A.

JANUARY 29TH, 1902.

COURT OF APPEAL—CHAMBERS.

RE NORTH WATERLOO ELECTION.

*Controverted Election—Deposit—Rival Claimants—Disputed Facts—
Issue must be Directed—Practice—R. S. O. ch. 11.*

Application by the solicitors for the petitioner, under Rule 15 of the Rules of practice and procedure, etc., made pursuant to R. S. O. 1897 ch. 11, for payment to them of the fund of \$1,000 deposited under sec. 14. The fund was also claimed by the subscribers of it.

W. E. Middleton, for solicitors.

W. M. Reade, Waterloo, for subscribers.

OSLER, J.A.—I cannot dispose of this matter otherwise than by directing the trial of an issue between the rival claimants, as the facts are disputed. The trial will be at Berlin, before a Judge without a jury, or elsewhere as I may order after hearing the parties. Costs reserved.

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JANUARY 30TH, 1902.

DIVISIONAL COURT.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION AND EXCELSIOR LIFE INSURANCE CO.

Arbitration and Award—Submission to Two Arbitrators—Summary Proceeding—Discretion of Court or Judge—Practice—R. S. O. 1897 ch. 62, sec. 8.

An agreement, that a sum is to be "ascertained by the arbitration of two disinterested persons, one to be chosen by each party to the agreement, and if the arbitrators are unable to agree they shall choose a third, and the award of the majority shall be sufficient," is within R. S. O. 1897 ch. 62, sec. 8, and if one party fails to appoint after notice, then the other may appoint his arbitrator to act as sole arbitrator.

Semble:—The Court or a Judge may, in the exercise of discretion, decide such a question in a summary proceeding.

Appeal by the corporation from order of STREET, J., in Chambers (2 O. L. R. 301), dismissing their application for an order setting aside the appointment by the insurance company of a sole arbitrator. A guarantee policy of insurance made by the corporation in favour of the company contained a provision that, if any difference should arise in the adjustment of a loss, an award should be made by two disinterested persons, one to be chosen by each party, and on their disagreement the two should choose a third, the award of the majority to be sufficient. Differences having arisen, the company appointed their arbitrator, and gave

notice thereof to the corporation, but they refused to appoint one. The company, therefore, acting under R. S. O. 1897 ch. 62, sec. 8, appointed their arbitrator sole arbitrator. By sec. 8, where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention, if either party fails after notice from the other to appoint his arbitrator the other may appoint a sole arbitrator. STREET, J., held that the submission was within the terms of the section, and that the insurance company were entitled to appoint their arbitrator as sole arbitrator.

A. B. Aylesworth, K.C., for appellants.

R. McKay, for respondents.

Judgment was delivered on January 30th, 1902.

MEREDITH, C.J.—The case is reported in 2 O. L. R. 301, and the facts are sufficiently set forth there. The question for decision is whether the submission is one providing for a reference “to two arbitrators, one to be appointed by each party,” within the meaning of sec. 8 of the Arbitration Act, R. S. O. 1897 ch. 62. The submission provides . . . for “arbitration of two disinterested persons, one to be chosen by each party, and if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient.” . . . The appellants relied on *Gumm v. Hallett*, L. R. 14 Eq. 555, deciding a question under sec. 13 of the C. L. P. Act, 1854, the same practically as sec. 8; *Re Smith and Service and Nelson & Sons*, 25 Q. B. D. 545; *Manchester Ship Canal Co. v. Pearson*, [1900] 2 Q. B. 606; and *Re Sturgeon Falls E. L. & P. Co. and Town of Sturgeon Falls*, 21 C. L. T. Occ. N. 595: as conclusive against the right of the respondent to appoint a sole arbitrator under the provisions of sec. 8. . . . We should have preferred not to decide this important question on a summary application, but, as appellants insist, we decide it without conceding that the matter is one, as to which the Court or a Judge may not exercise a discretion as to granting or refusing the application. . . . In the English cases, *supra*, the reference was in terms to three arbitrators, one to be appointed by each party, and the third by the two appointed, though a majority award was to be sufficient. Under such a submission, it is probably *necessary* that the third arbitrator be appointed before the reference begins: *Peterson v. Ayre*, 14 C. B. 665: while here the reference is to

two arbitrators, and the intervention of a third is to take place if the two cannot agree, and then the reference is to be to three, and the majority award sufficient.

Why then should not the submission be held to come within sec. 8? If, as must be and was conceded in *Re Smith*, *supra*, a reference to two arbitrators, one to be appointed by each party, is within sec. 8, although the submission further provides that the two arbitrators may appoint an umpire, and that in certain events the umpire may make the award in lieu of the arbitrators—and such a provision is, since the Act, to be deemed included in a submission, unless a contrary intention is expressed in it—I am unable to understand why a submission to two arbitrators, one to be appointed by each party, with a provision that if the two are unable to agree, they are to choose a third, and the award of the majority is to be sufficient, is not also within sec. 8. In *Bates v. Cook*, 9 B. & C. 407, the question arose on the appointment of an umpire, not a third arbitrator, . . . and I am unable to find a case in which such question has arisen as to the appointment of a third arbitrator.

MACMAHON, J.—I entirely concur with the judgment in the *Sturgeon Falls* case. There, the reference was in case of dispute to be “by each party choosing an arbitrator, and they two a third, in case of dispute; the majority award to be binding.” Here the third arbitrator is to be appointed if the two are “unable to agree.” A distinction therefore cannot be drawn between the two cases. See *Redman’s Law of Awards*, 3rd ed., at p. 2, as to the effect of sec. 6 of the English Act, the equivalent of sec. 8 of our Act.

Where a submission makes provision for the appointment of a third arbitrator, although he is not to be chosen unless the two appointed by the parties are unable to agree, it thereby provides for a contingency which may happen, viz., a reference to three arbitrators. I therefore think the submission is not within the Act.

LOUNT, J., agreed with MEREDITH, C.J.

Appeal dismissed with costs.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for appellants.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, Toronto, solicitors for respondents.

JANUARY 30TH, 1902.

DIVISIONAL COURT.

MINNS v. VILLAGE OF OMEMEE.

Divisional Court—Two Judges—Adjournment of Appeal to be Heard before a Court composed of Three Judges, on Request of a Party.

Appeal by plaintiffs from judgment of BOYD, C., (21 C. L. T. Occ. N. 561) dismissing the action.

George H. Watson, K.C., and T. Stewart, Lindsay, for plaintiffs.

F. D. Moore, Lindsay, for defendants.

The plaintiffs relied upon the judgment of a Divisional Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.), in *Homewood v. City of Hamilton*, 1 O. L. R. 266, which BOYD, C., distinguished. The Court, as at present constituted (MEREDITH, C.J., LOUNT, J.), now expressed the opinion that the case should not proceed before two Judges, and the defendants' counsel expressing a desire to have three Judges sitting instead of two, the case was ordered to stand over.

FEBRUARY 5TH, 1902.

DIVISIONAL COURT.

WEBB v. OTTAWA CAR CO.

Contract — Noration — Consideration — Collateral Promise — Oral Evidence to Alter Writing—Costs.

Goss v. Lord Nugent, 5 B. & Ad. 58, applied.

Action to recover the price of some brickwork done by plaintiff in setting two tubular boilers at the defendants' works in Ottawa. The defendants alleged that the work had been done for one Campbell, whom they brought in as a third party. At the trial LOUNT, J., gave judgment for plaintiff against defendants for \$574.78, and also dismissed defendants' claim over against Campbell. The defendants appealed.

W. H. Blake, for defendants.

J. E. Burritt, Ottawa, for plaintiff.

J. Bishop, Ottawa, for third party.

The judgment of the Divisional Court (FALCONBRIDGE, C.J., STREET, J.), was delivered by STREET, J.:— . . . Campbell had supplied boilers to defendants under circumstances which made him practically guarantee that

the boilers would give satisfaction. . . . The defendants notified Campbell that the boilers did not give satisfaction . . . he proceeded to put in two new boilers, and the plaintiff did the brickwork, for which he claims in this action . . . he was directed to do the work by one Wylie, defendants' manager, under whose directions the plans were prepared, and who told plaintiff to keep the brick account separate from that of the work he was doing for the company, because Campbell had to pay for the former. The plaintiff says he understood Wylie to refer to the arrangement between Campbell and the defendants, and always believed that defendants, and not Campbell, were responsible to him for his work. After the work was finished an agreement was come to, on the 17th November, 1900, between Campbell and defendants in the following terms:—"I agree to accept from the Ottawa Car Co. . . . \$962.84 . . . for two boilers . . . and I agree to make settlement with F. H. Webb, contractor for brickwork. The taking out of the boilers is included in this settlement. It is optional with the company to indemnify me for part of this outlay, should they so decide after taking this matter into their consideration. W. J. Campbell." The defendants then paid Campbell \$962.84. At the time this agreement was signed, Wylie promised to use his influence with the directors to get defendants to recoup Campbell his loss in the matter, but he was informed and fully understood that this created no obligation on their part. On 23rd February, 1901, plaintiff signed a letter prepared by Wylie, stating that he, plaintiff, had been told from the first that he must look to Campbell for his money, and that before the company settled with their contractor, he had agreed to look to him for payment. Plaintiff said that he signed this letter, knowing that the statements in it were not strictly correct, upon Wylie assuring him that if he would sign it Campbell would pay him at once. . . . Campbell refused to pay, and this action was commenced. I think the trial Judge was right in holding that defendants had always been and remained still liable to plaintiff. In the absence of the letter there is no doubt of defendants' liability. The letter, if true, disentitled the plaintiff to recover, but it is difficult to believe it to be so, and the trial Judge has accepted plaintiff's version of it. . . . Wylie has, however, fallen short of effecting a novation of the contract; he has made Campbell promise defendants that he will pay plaintiff, and he has got the plaintiff to say that he will look to Campbell, but has not created any contract between Campbell and

the plaintiff, and therefore the plaintiff's original claim against defendants remains in force. . . . I am unable however to agree with that part of the judgment which discharges Campbell. The agreement of 17th November, 1900, is perfectly explicit, and the consideration which supports it is the receipt of the \$962.84 upon the express promise on his part to pay amount of Webbs' account for the brick-work in question, and which, under his original agreement with defendants, he was bound to pay . . . Wylie's promise to use his influence with the directors was purely a private matter between him and Campbell, and is not a promise upon which defendants are liable, and is, moreover, vague in its character, and does not excuse Campbell from liability. This is one of the cases in which the rule of evidence against allowing a party to a written document to give evidence of a conversation happening just before its execution, with the object of contradicting its terms, must be applied: *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Taylor on Evidence*, sec. 1132. The rights which very possibly Campbell might have made good against the company, he chose with his eyes open and for good consideration to abandon, and to rely on its mere good-will. There is no ground in law or in equity upon which he should be allowed to withdraw from his contract, and the judgment should therefore be varied by directing Campbell to pay to defendants the sum found due by defendants to plaintiff, together with the costs incurred by the defendants in bringing Campbell in as a party, and of the trial of their claim against him as a third party. The defendants are not to recover from Campbell the costs taxed against them by plaintiff, because they have failed in their contention that they were not liable to him, upon which contention these costs were principally incurred. The defendants are to pay to plaintiff his costs of appeal, which is dismissed as far as he is concerned. They are to recover against Campbell their costs of appeal, having succeeded against him.

Code & Burritt, Ottawa, solicitors for plaintiff.

McLaurin & Millar, Ottawa, solicitors for defendants.

Bishop & Smith, Ottawa, solicitors for third party.

Moss, J.A.

FEBRUARY 7th, 1902.

CHAMBERS.

RE MARGARET EVANS.

*Will—Construction—Legacy—Not Absolute Gift nor yet Life Interest
—Discretion of Executors.*

Re Sanderson's Trust, 3 K. & J. at p. 507, applied.

Application under Imperial Act 10 & 11 Vict. ch. 96, R. S. O. 1897 ch. 51, and Rules 938 and 1103, by executors and trustees under the will of Margaret Evans, deceased, for a direction as to the proper disposition of a fund of \$300 mentioned in the will.

The clause in the will disposing of the fund is as follows:—

"I give and bequeath to my sons Grier Evans and William James Evans the sum of \$300 each, but I direct my said executors to invest the same on good security during the lifetime of my said sons or the survivor of them, and to pay to each of them the one-half of the interest arising from such investment, and in case of sickness of my said sons or either of them, I desire my said executors to advance such portion as they may think necessary of the principal money to support my said sons, or such of them as may be sick, and in case of the death of one of my said sons his legacy, after paying his funeral and other necessary expenses, to be divided equally amongst my surviving children, with the exception of my surviving son's share, which I direct my executors to invest and pay the interest yearly during his lifetime."

Grier Evans died, intestate, on June 23rd, 1901, leaving surviving two sisters and one brother, all over 21 years of age. Action was brought on November 11th, 1901, and is pending in the County Court of Grey, by one Alexander Wright against the applicants, in respect of a claim of \$200 for board and lodging furnished to Grier Evans in his lifetime, and the plaintiff in that action asked for a declaration that the sum of \$300 in the executors' hands is liable for the payment of his claim. Grier Evans was indebted to other persons. The executors asked for construction of the will, an order staying proceedings in the County Court action, and other relief.

J. Bicknell, for executors.

R. U. McPherson, for brothers and sisters of Grier Evans, deceased.

H. G. Tucker, Owen Sound, for Alexander Wright.

Moss, J.A.—The testatrix did not very clearly express her intentions with regard to the exact nature of the interest to be taken by her two sons Grier Evans and William James Evans in the moneys bequeathed to them, and it is somewhat difficult to get at her precise meaning. Mr. Tucker conceded, and I think rightly, that it is not a case

of an absolute gift of the corpus. But he argued, and I think rightly, that it is more than a gift of a life interest in the income. The direction to the executors, that, in case of sickness of the sons or either of them, they are to advance out of the principal such portion as they may think necessary for the support of the one who is sick, gives an interest in the corpus. It creates a trust to be exercised by the executors in case of sickness, and they have no discretion to decline to exercise it, if called upon to do so.

They are at liberty to use their discretion in determining the amount necessary to be applied for the support of the sick one, and in that respect they would not in ordinary circumstances be controlled by the Court.

I think the effect of these directions of the will is that, upon a son falling sick, a right to some portion of the principal of his legacy vests in him, the amount being that which the executors may in their discretion think necessary for his support during his sickness, and that in the event of his death before receiving that amount, his estate is entitled to receive it from the executors.

It appears to be the case that the executors had no knowledge of Grier Evans's sickness, and were not called upon to exercise their discretion as to the amount to be advanced, but if I am correct in my reading of the will, and the fact of sickness is all that is needed to vest the right to some amount, and to give rise to the duty of advancing it, the circumstance that the beneficiary died before it was actually advanced or set apart should not operate to deprive his personal representative of the right to receive it. The language of Vice-Chancellor Sir W. Page Wood in *In re Sanderson's Trust*, 3 K. & P. at p. 507, seems applicable, although the circumstances were not the same. He said: "The trustees have not the discretion of saying 'we will withhold any part of this income merely upon our representation of what we think discreet.' If a bill had been filed in behalf of this gentleman, during his lifetime, to have a sufficient part of the income drawn out for the purposes of his maintenance, attendance, and comfort, it would not have been competent for the trustees to say, 'we in our judgment, and in the exercise of our discretion, do not think that this is requisite, and the matter is one for our discretion and not for the judgment of the Court.' The testator might have given them such a discretion, regard being had to the circumstance that his brother had other property; but that is not the trust he has created. The trust he has created is an absolute trust for his brother to have everything necessary for his maintenance, attend-

ance, and comfort." And see *Kilvington v. Gray*, 10 Sim. 293.

Here, a case of sickness being made, I think the trust which was created for that specific purpose arose, and the executors may still exercise their judgment and discretion as to the amount necessary to be advanced to answer what was required for support in the sickness, or, if they are not now disposed to exercise this power, the Court may undertake it.

This does not give the creditors of Grier Evans any direct claim against the executors or the fund. In strictness the claim should be maintained by the personal representative of Grier Evans, and unless the parties can now agree (all being adults) it may be necessary to appoint a personal representative.

If the executors are prepared to declare what sum should be advanced, and the other parties are willing to dispense with a personal representative, and to agree to a proper distribution of the sum amongst the claimants against Grier Evans's estate, the clerk in Chambers may make the necessary inquiries as to the claimants, and apportion the amount payable to each, and the executors may hold the residue to be dealt with as provided by the will.

In that event they and the parties interested in the residue may receive their costs out of the fund.

I do not think I can stay the action brought by Alexander Wright in the County Court of Grey, but if he chooses to discontinue it, and to come in and take the benefit or the order in this proceeding, he may have his costs of this proceeding. On the subject of costs I observe that there is not only an originating motion, but a petition by the executors, which seems entirely unnecessary.

At present I dispose of the matter by declaring that the executors hold the sum of \$300 in question subject to the right of the personal representative of Grier Evans to receive thereout such sum as may be deemed necessary as an advance for the support of Grier Evans in his sickness, and, subject thereto and to the payment of his funeral and other necessary expenses, for the persons named in the will as entitled in remainder.

In case of any question arising on settling the order, the matter may be spoken to before me at any time.

Mark & A. E. Scanlon, Bradford, solicitors for executors.

McPherson, Clark, Campbell, & Jarvis, Toronto, solicitors for beneficiaries.

H. G. Tucker, Owen Sound, solicitor for Alexander Wright.

sufficiently corroborated: Radford v. Macdonald, 18 A. R. 167; Green v. McLeod, 23 A. R. 676.

Judgment accordingly.

Delahaye & Reeves, Pembroke, solicitors for plaintiff.

J. H. Burritt, Pembroke, solicitor for adult defendant.

J. Hoskin, Official Guardian.

McDOUGALL, Co. J., York. DECEMBER 26TH, 1901.

ASSESSMENT CASE.

RE McMASTER ESTATE.

Assessment and Taxes—Exemptions—Trustees—Income—R. S. O. ch. 224, sec. 46—63 Vict. ch. 34, secs. 3, 4.

The income derived from the property vested in the trustees of the estate of the late Honourable William McMaster was held by the Court of Appeal, affirming the judgment of the senior Judge of the county of York, to be, for assessment purposes under R. S. O. ch. 224, their own income: 2 O. L. R. 474. Subsequently R. S. O. ch. 224 was amended by 63 Vict. ch. 34.

In 1901 the trustees were assessed as theretofore, and the assessment was confirmed by the Court of Revision for the City of Toronto. This appeal was then taken by the trustees, and heard before McDOUGALL, senior Judge of County Court of York.

George Bell, for the trustees.

J. S. Fullerton, K.C., for the city of Toronto.

McDOUGALL, Co. J.—In this appeal the assessment department has assessed the income of the McMaster estate in the hands of the trustees, which income, under the will of the late Hon. William McMaster, is payable to the trustees of McMaster University for the purposes of the University. In 1899 I held this income was properly assessable in the hands of the estate trustees, and, upon an appeal to the Court of Appeal, my conclusion was upheld. While that appeal was pending the Legislature amended sec. 46 of the Assessment Act by 63 Vict. ch. 34, secs. 3 and 4. The amended section now reads as follows, the amending words being in italics:

46. (1) Personal property in the sole possession, or under the sole control of any person or trustee, guardian, executor, or administrator, *and which if in the possession of the beneficiary or beneficiaries would be liable to taxation*, shall be assessed against such *person, trustee, guardian, executor, or administrator* alone.

(2) Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment, and he shall be assessed for the value of the real and personal estate held by him, whether in his individual name, or in conjunction with others in such representative character, *subject to the provisions of sub-section 1 of this section*, at the full value thereof, or for the proper proportion thereof, if other residents within the same municipality are joined with him in such representative character.

What I have now to determine is as to the effect on the present appeal of this amendment. It is conceded by the city that, if the words "and which if in the possession of the beneficiary or beneficiaries would be liable to taxation" mean that this income in question is to be looked upon and treated, for the purpose of determining its liability to assessment, as actually in the hands of the McMaster University trustees at the date of the assessment, but by the taking of an account of the total income of the McMaster University of the year, including in the income the sum payable by the trustees of the McMaster estate, and deducting therefrom the legitimate outgoings properly chargeable to income of the same period, no surplus whatever would be shewn; in other words, the annual legitimate expenses of the University equal or exceed its total annual income from all sources, and therefore the *McMaster University* would not be liable to any assessment for personal property attributable to surplus income. As the beneficiary in this case is resident within the Province, and therefore directly liable in its corporate capacity to assessment for any personal property exigible under the Assessment Act, I am of opinion that the amending words of the Act of 1900 apply, and as, apparently, the sum in question in the hands of the trustees of the McMaster estate is to be regarded as actually in the hands of the trustees of the McMaster University, and the latter as the persons to be looked upon as the owners for the purpose of determining the assessability of the fund as part of their income, the admission by the city that the University has no assessable income, even with this sum included in their income receipts, disposes of the matter of this appeal. The appeal will be allowed.

Thomson, Henderson, & Bell, Toronto, solicitors for trustees.

T. Caswell, Toronto, solicitor for corporation.

MEREDITH, J.

FEBRUARY 8th, 1908

WEEKLY COURT.

Re McALPINE AND LAKE ERIE AND DETROIT
RIVER R. W. CO.

*Arbitration and Award—Clerical Error in Award—Reference back—
Arbitration Act of Ontario—Railway Act of Canada.*

Motion by a land-owner for an order referring back award of compensation under the Dominion Railway Act to the arbitrators to correct a clerical error as to the date from which interest was to run, the arbitrators having put in the award "1901," instead of "1900," as they intended.

T. W. Crothers, St. Thomas, for the motion.

H. E. Rose, for the company.

MEREDITH, J.—If provincial legislation applies to this case, the motion is needless, because, by R. S. O. ch. 62, sec. 9 (c), the arbitrators have power to correct the mistake. If that legislation is not applicable, there is no power to remit the award, or to correct the error upon the motion. Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through arbitrators: *Ward v. Dean*, 3 B. & Ad. 234; *Mordue v. Palmer*, L. R. 6 Ch. 22. . . . The question then is, assuming that provincial legislation is not applicable, does the Railway Act, 51 Vict. ch. 29 (D.), authorize the re-opening of the matter? . . . Under its provisions, the award is to be final and conclusive, but subject to appeal when the award exceeds \$400. . . . I have been able to find one case only in which there was a reference back of a case of this character, but that was in accordance with an agreement between the parties requiring it: *Demorest v. Grand Junction R. W. Co.*, 10 O. R. 515. The Railway Act does not, in my opinion, authorize the re-opening of the reference, and, if provincial legislation applies, there is no need for re-opening it: see R. S. O. ch. 62, secs. 47 and 9 (c).

Motion dismissed without costs.

Crothers & Price, St. Thomas, solicitors for the land-owner.

J. H. Coburn, Walkerville, solicitor for the company.

FEBRUARY 8TH, 1902.

DIVISIONAL COURT.

WILSON v. BOTSFORD-JENKS CO.

*Master and Servant—Negligence of Master—Defective Scaffolding—
Foreman of Master—Secretary of Master—Knowledge of—
Admission of Evidence.*

Motion by plaintiff to set aside non-suit entered by FERGUSON, J., at the trial at Owen Sound of an action at common law by servant against master to recover damages for injuries received by the former in the course of his employment, owing to the alleged negligence of the master, and for a new trial, on the ground that there was evidence of negligence to go to the jury. The injury was received in September, 1900. The work was the building of an elevator at Meaford, and the plaintiff was engaged in excavating. The alleged negligence was the unsafe and dangerous condition of a scaffolding upon which the foreman ordered the plaintiff to go, and it was said that the condition existed to the knowledge of one Jenks, the secretary of the defendants, an incorporated foreign company, and that Jenks personally interfered with the work. The trial judge held that there was no evidence to submit to the jury. The plaintiff contended that the whole case should have been left to the jury, the company being bound by the knowledge of Jenks.

W. J. Hatton, Owen Sound, for plaintiff.

W. R. Riddell, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

FALCONBRIDGE, C.J.—It is not shown that Jenks in any way assumed to give orders to the men, or directions as to the practical work which was going on. There was some evidence that he was standing with his hands in his pockets, looking into the excavation on the morning of the accident, and that on former occasions he had been seen to call Danger (the superintendent) to one side, and say something to him which no one overheard. There was no evidence that the persons employed by defendants were not proper and competent persons, or that the materials used were faulty or inadequate: *Matthews v. Hamilton Powder Co.*, 14 A. R. 261; *Wigmore v. Jay*, 2 Ex. 354; *Lovegrove v. London, etc., R. W. Co.*, 16 C. B. N. S. 669. There was

no evidence that defendants had any better means of knowing of the danger than plaintiff. As to all the matters in respect of which plaintiff can seek here to charge defendants, the onus is on him: cases above cited and *Allen v. New Gas Co.*, 1 Ex. D. 251. The secretary had no authority to make admissions on behalf of the company as to the defective condition of the scaffolding, and defendants' knowledge of it: *Bruff v. Great Northern R. W. Co.*, 1 F. & F. 344; *Great Western R. W. Co. v. Willis*, 18 C. B. N. S. 748; *Barrett v. South London Tramways Co.*, 18 Q. B. D. 815; *Johnson v. Lindsay*, 53 J. P. 599; *Newlands v. National Employers' Accident Association*, 53 L. T. N. S. 242.

Motion dismissed with costs.

W. J. Hatton, Owen Sound, solicitor for plaintiff.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, solicitors for defendants.

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WINCHESTER, MASTER.

FEBRUARY 5TH, 1902.

CHAMBERS.

CANADIAN MINING, ETC., CO. v. WHEELER.

*Judgment Debtor—Transferee of—Examination—Third Mortgage—
“Exigible under Execution”—Legal and Equitable Execution—
Receiver—Rule 903—56 Vict. ch. 5, sec. 9 (O.)*

The holder of a third mortgage given by a judgment debtor is not examinable under Rule 903.

Application by the plaintiffs, who are execution creditor of defendant, for an order to examine his transferee.

W. R. P. Parker, for plaintiffs.

J. J. MacLennan, for transferee.

The Master in Chambers:—The transferee is a mortgagee to whom the judgment debtor has given a mortgage on certain lands belonging to the debtor, and who had previously given two prior mortgages thereon to other parties.

Counsel for the transferee contends that the rule under which the plaintiffs apply, does not include him, as he is not a person “to whom the debtor has made a transfer of his property or effects *exigible under execution*.” He admits that the debtor has given him a mortgage on certain real estate belonging to the debtor, but claims that it is a third mortgage upon the property, and therefore is not a transfer of property exigible under execution: *Jarvis v. Ireland*, 4 A. R. 118 at p. 122.

Counsel for the plaintiffs claim that the words “exigible under execution” include equitable execution, and the appointment of a receiver: *In re Pope*, 17 Q. B. D. 743.

The former Con. Rule 928, from which the present Rule 903 is taken and under which the present application is made, was not limited by the words “exigible under execution.” These words were, for the first time, added to the present Rule at the last consolidation, and were apparently taken from similar words used in 56 Vict. ch. 5, sec. 9 (O.) This section became Rule 904 in the last consolidation of the rules, and, no doubt, Rule 903 was made to harmonize

with Rule 904 in this respect. This term "exigible under execution" in the Act referred to meant a legal execution only, as that statute related exclusively to "certain duties, liabilities and fees of sheriffs," and I am of opinion that the same meaning to these words attaches to them in Rule 903 as in sec. 9, ch. 5, 56 Vict. (O.), and that equitable execution or the appointment of a receiver is not included by their use. As to the difference between a legal and equitable execution, I would refer to *In re Shepherd*, 38 W. R. 133

The motion must be refused.

Parker & Bickford, Toronto, solicitors for plaintiffs.

Robertson & Maclellan, Toronto, solicitors for defendants.

MACMAHON, J.

FEBRUARY 10TH, 1902

TRIAL.

KEITH v. OTTAWA AND NEW YORK R. W. CO.

Railway and Railway Companies—Injury to Passenger—Alighting from Moving Car—Contributory Negligence.

Washington v. Harman, 147 U. S. R. 571, and Central R. W. Co. v. Miles, 88 Ala. at p. 261, referred to.

Action to recover damages for injuries sustained by plaintiff, who endeavoured to get off a train as it was moving out of Finch station.

George McLaurin, Ottawa, for plaintiff.

W. Nesbitt, K.C., and W. H. Curle, Ottawa, for defendants.

MACMAHON, J.—At the conclusion of the trial I submitted certain questions to the jury, which, with their answers, are as follows:

(1) How long did the train stop at Finch station? A. Cannot say.

(2) Was the time the train remained there sufficient to enable the plaintiff to alight? A. No.

(3) Was Keith aware when he reached the platform of the car that the train was in motion? A. Yes.

(4) If Keith was guilty of any negligence which contributed to the accident, what was such negligence? A. None.

(5) If Keith is entitled to recover, at what do you assess the damages? A. \$1,000.00.

I reserved the consideration of the motion by counsel for the defendants for non-suit, and have reached the following conclusion:

The motion for a non-suit cannot prevail. In my charge to the jury, I said: "If they (the company) gave the plaintiff ample facilities to get off, but he did not do so, but attempted to get off when he knew there was danger in getting off, the company ought not to be held responsible for his act, and looking at it in that way, it is for you to say whether he acted reasonably in getting off under the circumstances appearing in the evidence." The answer therefore to the fourth question, that the plaintiff was not guilty of any negligence which contributed to the accident, is a finding that he was acting as a reasonable man would in getting off the train, although it was in motion. And according to the evidence of Daniel E. Seese, the company's station agent at Finch, the car had only gone thirty feet when the plaintiff got off, and the jury might properly conclude that the plaintiff was not acting unreasonably in endeavouring to alight.

See *Washington v. Harman*, 147 U. S. R. 571, Central R. W. Co. v. *Miles*, 88 Ala., at p. 261; and refer also to *Loyd v. Hannibal R. W. Co.*, 4 American Negligence Cases, 481; *Covington v. Western R. W. Co.*, 81 Ga. 276; *Radley v. L. & N. W. R. Co.*, 1 App. Cas. 754; *Filer v. N. Y. C. R. W. Co.*, 49 N. Y. 47.

I direct that judgment be entered for the plaintiff, for \$1,000, with costs.

McLaurin & Miller, Ottawa, solicitors for plaintiff.

Scott, Scott, & Curle, Ottawa, solicitors for defendants.

Moss, J.A.

FEBRUARY 11TH, 1902.

C. A.—CHAMBERS.

RE CARLETON PLACE VOTERS' LISTS.

Parliamentary Elections—Voters' Lists—Notice of Complaint—Statement of Grounds—Signing by Complainant—Amendment.

Case stated by the County Judge of Lanark, for the opinion of the Court of Appeal or a Judge thereof, under R. S. O. ch. 7, sec. 38, as follows:—1. At the sittings of the Court to hear and determine complaints of errors and omissions in the voters' lists, it was objected that in the notice of complaint the printed "M. F. and" did not disclose any ground of complaint within the meaning of the Act.

Without calling for evidence, I expressed the opinion that "M. F." had, in connection with voters' lists matters, acquired the meaning of "Manhood Franchise," and the word "and" could be treated as surplusage. Was I right?

2. The notice of complaint as filed consists of fifteen sheets, each in itself in the form number 6 in the Act, the lists Nos. 1, 2, 3, and 4 being printed on the back of the notice of complaint. Only the notice of complaint on the last sheet was filled out and signed by the complainant, but evidence was given that the whole fifteen sheets were attached together as they now appear when the complainant signed the notice of complaint on the last sheet, and handed the whole to the clerk. I expressed the opinion that, considering it my duty to further the franchise, while entertaining great doubts, I thought that sufficient. Was I right?

3. The complainant asked leave to amend, if necessary, under sec. 32 of the Act, by making the signed notice refer explicitly to the annexed sheets. I refused the amendment upon the grounds that if any necessity for it, the effect would be to confer jurisdiction on myself, and that sec. 32 can be satisfied in its words by confining it to notices other than notices of complaint. Am I right?

G. H. Watson, K.C., for those against the ruling of the County Judge.

E. Bristol and Eric N. Armour, for those supporting the ruling.

Moss, J.A.—Question 1 must be answered in the affirmative. The Legislature did not intend to bind parties to exact observance of the words of the forms (sec. 4). What is intended is that the list should afford such information of the nature of the qualification of the person named as will enable the other voters to ascertain, by inquiry, the truth or untruth of the statement. In this instance it cannot be well imagined that other voters, or persons who usually interest themselves in the revision of the lists, will be misled by the form of statement. The right of a person to be on the voters' list ought not to depend upon a too critical examination of the forms in the schedule, which are inserted merely as examples, and are not required to be followed implicitly.

The second question must also be answered in the affirmative. It may be treated as really one of fact. It is impossible to say that the lists are not subjoined. They are annexed or attached, which means subjoined. Looking at the lists, and reading them in the light of the notice, there

is no sufficient ambiguity to lead to the rejection of them on the ground that they are not part of the complaint.

Question 3 must also be answered in the affirmative in this particular case. In a case of a notice defective in some material respect, *e.g.*, unsigned, which renders it valueless as a foundation for the proceedings, which the Judge is authorized to take upon receipt by the clerk of a notice in conformity to the Act, there is no jurisdiction to amend; but, assuming the notice and lists to be properly before a Judge, a misnomer or plain mistake in description and many other like errors may be amended.

Watson, Smoke, & Smith, Toronto, and Bristol, Cawthra, & Bayly, Toronto, solicitors.

MEREDITH, C.J.

FEBRUARY 11TH, 1902.

CHAMBERS.

CARSWELL v. LANGLEY.

*Bankruptcy and Insolvency — Contingent Debts — Sums Payable
Quarter-yearly by Person Becoming Insolvent — Not Provable
under R. S. O. ch. 147.*

Special case.

J. J. Warren, for plaintiff.

F. E. Hodgins and W. M. Irwin, for defendant.

MEREDITH, C.J.—The defendant is the assignee for benefit of creditors of one E. F. Robinson, and the action is to establish the right of the plaintiffs to prove and rank upon the estate of Robinson for the present value of \$100 per quarter, which he, before the date of the assignment, covenanted with them to pay to one Jane Robinson on the first day of each quarter-year during her natural life.

These growing quarterly payments are in their nature contingent debts, and not provable under R. S. O. ch. 147; *Grant v. West*, 23 A. R. 533; *Mail Printing Co. v. Clarkson*, 25 A. R. 1. Judgment for defendant without costs.

CHAMBERS.

MEREDITH, C.J.

FEBRUARY 11TH, 1902.

CROWN CORUNDUM AND MICA CO. v. LOGAN.

*Action — Order dismissing — Undertaking — Default in Giving —
Effect of.*

Carter v. Stubbs, 6 Q. B. D. 116, followed.

Collinson v. Jeffery, [1896] 1 Ch. 644, distinguished.

Appeal from order of Master in Chambers.

The defendants moved before the Master in Chambers to dismiss the action for want of prosecution, and on 5th October, 1901, he made an order directing that in default of plaintiffs, within 4 weeks, undertaking to bring the action for trial at Peterborough in December, 1901, and proceeding to trial then, that the action be dismissed with costs. On appeal *MEREDITH*, C.J., affirmed that order, and on further appeal, a Divisional Court affirmed his order, and refused to extend the time for trial or relieve plaintiffs from the consequences of failing to give the undertaking. Subsequently, defendants applied to the Master in Chambers for an order dismissing the action, and on 31st January, 1902, he made an order allowing plaintiffs to go to trial at Peterborough on 27th May next. The defendants appealed.

G. M. Macdonnell, K.C., for defendants.

W. E. Middleton, for plaintiffs.

MEREDITH, C.J.—At the expiration of the time allowed for giving the undertaking, the action was at an end: *Whistler v. Hancock*, 3 Q. B. D. 83; *King v. Davenport*, 4 Q. B. D. 402; *Carter v. Stubbs*, 6 Q. B. D. 116; *Hollander v. Ffoulkes*, 16 P. R. 225, though pending an appeal, but not afterwards, an order extending the time for trial might have been made: *Carter v. Stubbs*, *supra*, and the time, though it has expired, for appealing from such an order, may be extended: *Carter v. Stubbs*, *supra*, *Burke v. Rooney*, 4 C. P. D. 226. . . .

In *Collinson v. Jeffery*, [1896] 1 Ch. 644, *Kekewich*, J., recognized that a different rule, from that which he had adopted, was applicable where the order was one dealing with the dismissal of an action for want of prosecution?

In *Script Phonography Co. v. Gregg*, 59 L. J. Ch. 406, *North*, J., treats *Whistler v. Hancock*, and *King v. Davenport*, *supra*, as settling the law. . . .

Even if the Master in Chambers had jurisdiction to make his second order, it would have been improper to do so after the order of the Divisional Court.

Appeal allowed with costs, but motion dismissed without costs, because it was unnecessary.

Kilmer, Irving, & Porter, Toronto, solicitors for plaintiffs.

Macdonnell & Farrell, Kingston, solicitors for defendants.

LOUNT, J.

FEBRUARY 12TH, 1902.

TRIAL.

HARRIS v. STEVENS.

Sale of Goods—Credit—Promise Written to Mercantile Agency to be Responsible for Goods Delivered to Another Person Carrying on Business in Another Name—Not within Statute of Frauds—Partnership.

Action tried at London, brought to recover \$985, the price of goods sold and delivered to the Stevens Manufacturing Company, and \$900, the amount of the company's promissory note, given for price of other goods.

E. Meredith, K.C., and J. C. Judd, London, for plaintiff.

G. C. Gibbons, K.C., and M. D. Fraser, London, for defendants Labatt and Stevens.

W. C. Fitzgerald, London, for defendants Fitzgerald & Co.

LOUNT, J.—The plaintiff alleges that at the time of the sale of the goods, the defendants Labatt and Fitzgerald were the real owners of the business carried on as the Stevens Manufacturing Co., and that the goods were supplied on their credit, or that the defendants were carrying on the business in partnership. He also alleges that defendants Labatt and Fitzgerald & Co. furnished to R. G. Dun & Co., mercantile agency, a writing stating that "In reply to your enquiry, we beg to say that we hold ourselves responsible for the payment of all goods which may be bought for, and delivered to or on account of the Stevens Manufacturing Co., in the course of their business," which was furnished for publication to the trade, to be communicated to plaintiff and others having dealings with the Stevens Co., to enhance its credit, and to induce the furnishing of goods on credit; that this statement was shown to him, plaintiff, and he supplied the goods on the strength of it; and that said defendants authorized one T. A. Stevens, the company's manager, to pledge their credit for the goods. I find, on the evidence, against the plaintiff, and I find, also, that although the memorandum sent to R. G. Dun & Co. at their request was for publication, to the knowledge of the senders, the defendants Labatt and Fitzgerald & Co., it did not create a liability on their part to the plaintiff, to whom it was not addressed; and who is not a party to it. It is not a sufficient memorandum in writing to satisfy the Statute of Frauds. See *Williams v. Lake*, 2 Ell. & Ell. 349; *Williams*

v. Byrnes, 1 Moo. P. C. N. S. 195; Richard v. Stillwell, 8 O. R. 511; White v. Tomlin, 19 O. R. 513; McIntosh v. Moynihan, 18 A. R. 237.

Judgment for plaintiff against John Stevens, with costs. Action dismissed with costs as against the other defendants.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for plaintiff.

Fraser & Moore, London, solicitors for defendants Labatt & Stevens.

W. C. Fitzgerald, London, solicitor for other defendants.

OSLER, J.A.

FEBRUARY 11TH, 1902.

COURT OF APPEAL—CHAMBERS.

WIEDEMAN v. GUITTARD.

Promissory Note—Holder in Due Course—Effect of Indorsement—Evidence Necessary to Hold Indorser—Leave to Appeal—Bills of Exchange Act, 1890, secs. 29, 55.

Herdman v. Wheeler, 18 Times L. R. 190, approved.

Application by defendant S. A. C. White for leave to appeal from order of a Divisional Court affirming judgment at the trial.

W. M. Douglas, K.C., for the motion.

F. A. Anglin, for plaintiff.

OSLER, J.A.—The promissory note sued on was made by T. M. White and M. Guittard, payable to Hutchinson, Cramer & Co., indorsed by them to Mrs. S. A. C. White, and indorsed by her to plaintiff. . . . It is not denied that her legal relation is that of indorser to the plaintiff, and that being so, he is a holder in due course within sec. 29 of the Bills of Exchange Act, as explained in Herdman v. Wheeler 18 Times L. R. 190. Her indorsement admits, *prima facie* at all events, the ability and signature of all prior parties: sec. 55. In order to recover against her, the holder had only to prove her signature, and the performance of the conditions on which her liability as indorser depends, viz.: presentment, non-payment, and notice of dishonour. Has this been proved? A person named Henry Wiedeman, the name of the plaintiff, was called. He spoke of his being trustee for creditors of Windsor Brewery Co. . . . A sale of the property was made . . . in respect of the purchase money, he received the note in question . . . he said the note was not paid at maturity, and that it was protested (which *qua* any effect

to be given to the protest may be disregarded, if it be thought that the protest was not proved) after presentment, and notice sent; that it was presented the day it was due, and that notice was duly sent. This is the evidence of the holder of the note, the plaintiff, and from this it certainly ought to be inferred by any Judge, in the absence of any weakening of the statement by cross-examination, that the presentment was on the day the note became due, and that payment was refused. But it is contended that no one can tell what notice was sent or to whom. This is very like a special demurrer to the evidence, an attempt to pick holes in common phraseology, of which every one understands the meaning, language used by the holder of the note in testifying upon the issues joined in the action. The appellant was represented by counsel at the trial, and if she chose to leave the matter as plaintiff stated, it must be assumed that she could not have bettered her case or weakened his by cross-examination, and therefore that he was testifying that notice of dishonour of the note sued on was sent as required by law . . . I do not think it necessary to rely on the protest. It must be considered too, in dealing with the question of leave to appeal, that there is every reason to suppose that the objections are merely technical, and that the court would on the hearing of the appeal allow any defect to be supplemented by further evidence.

Motion refused with costs.

Murphy, Sale, & O'Connor, Windsor, solicitors for plaintiff.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant S. A. C. White.

OSLER, J.A.

FEBRUARY 12TH, 1902.

C. A.—CHAMBERS. .

CITY OF HAMILTON v. KRAMER-IRWIN ROCK
ASPHALT, ETC., CO.

Appeal Book—Contents—Action for Breach of Contract for Repair, etc., of Streets—Finding on Proper Construction of Contract—Appeal as to — Evidence on Various Issues — Inclusion of, in Appeal Book.

A motion by consent for direction as to the contents of the appeal book.

A. B. Aylesworth, K.C., for plaintiffs.

W. R. Riddell, K.C., for defendants.

OSLER, J.A.—The action was brought on a contract for the construction of pavements on certain streets in the city of Hamilton. It was tried at great length, and an immense volume of evidence taken on various issues relating to the condition of the streets, the causes of their disrepair, etc., etc., and from defendants' point of view, whether all or any of these causes were such as they were, within the contract, liable to make good. The trial Judge held that they were all within it, on the proper construction of the contract, and so holding, also held that it was not necessary for him to pass upon the specific issues of fact presented on the pleadings and evidence, and that plaintiffs are therefore entitled to succeed to the full extent claimed. He finds the amount of damages, apparently measured by the whole cost of the repair, giving the defendants a reference at their own expense and risk, if so advised. The defendants are appealing, and they desire to limit their appeal, in the first instance, to the point on which the trial judgment has turned, viz.: the construction of the contract, in order to avoid, if possible, the expense which would be entailed by an appeal upon the evidence and the special issues of fact. The additional expense of this it was said would be not far from \$1,000. The motion was opposed on the ground that the respondents would be embarrassed by having the appeal launched in this manner, involving, as it possibly (probably) would, two arguments in this Court, and a difficulty in possible subsequent appeals to the Supreme Court. If the whole case were before us, as in strictness and according to the usual practice it ought to be, as it was before the trial Judge, the plaintiff would have the right to support his judgment, in whole or in part, upon every ground open to him on the evidence in the issues, as well as upon that on which the learned trial Judge has rested it. We might direct the argument on the former to stand over until we could see that it was necessary for the plaintiff to enter upon that branch of the case, delaying in that event our final judgment until after the second argument. Either party would then be in a position to go to the Supreme Court upon the whole case. The strict right of the respondents here is to be in that position should our judgment be adverse to them on the question of construction.

If, on the other hand, this Court should be prepared to support the judgment at the trial, on the ground on which the learned Judge placed it, the defendants may go to the Supreme Court (and they are not prepared to say that they will not do so) and in that event also they must supply the evidence, so that the plaintiffs in the exercise of their right

may support the judgment on any ground they may think proper. The evidence ought, in that event, also to be before us when we give judgment, for it is the case as presented to us which should go to the Supreme Court, and it is, as I have said, the now respondents' right to have the case before us as fully as it was before the trial Judge. The defendants suggest that I might impose terms by which the evidence might be introduced for the purpose of the appeal to the Supreme Court. But this may lead to embarrassment, for I cannot say—no one can—how that Court may look at the case when it comes before them. They may raise all sorts of objections to hear the case in any other way than as it was argued and came before us, and I do not think I could order (or safely for the plaintiffs order) that the evidence shall be brought in merely for the purpose of the further appeal. It is quite conceivable that the Supreme Court would hold, that, even by consent of the parties, or by the imposition of terms, I had no authority to do so, or to provide for the case going before them in any other way than it had judicially come before us. From any point of view therefore, as the defendants are not prepared to say that in the event of judgment adverse to them on the construction of the contract they will go no further, it would be merely a matter of postponing the introduction of the evidence, and there is no object to be gained that I can see by doing that. If indeed the defendants could say that they were not going to the Supreme Court, and would submit to imposition of such a term, I might, so far as the appeal to this Court is concerned, accede to their application, although Mr. Riddell suggests that even on the question of construction there are some parts of the evidence which he desires to be in a position to refer to. This, however, is as far as I could go.

I may add that the matter of settling the appeal book in respect of the subject I have dealt with, has been referred to me, or some Judge of the Court, by the trial Judge to whom in strictness it appertains, and comes before me in this way by consent of the parties. For the actual order to be made in the settlement of the book remains to be made by the proper Judge, but I may say without going beyond the line of my duty, that I hope the parties in their own interests, as well as in that of the Court, will make an effort to limit the evidence brought up, to what is actually necessary for the purpose of the appeal.

McKelcan & Counsell, Hamilton, solicitors for plaintiffs.

Lee, Farmer, & Stanton, Hamilton, solicitors for defendants.

LOUNT, J.

FEBRUARY 12TH, 1902.

TRIAL.

LASJINSKI v. CAMPBELL.

*Contract—Foreigner—Fraud in Reducing Contract to Writing—
Void not Voidable—Sale of Standing Timber—Interest in Land
—Void if Wife of Patentee of Homestead not a Party—R. S. O.
ch. 25, sec. 17.*

Handy v. Carruthers, 5 O. R. 280, and Anderson v. Anderson, [1895] 1 Q. B. 749, followed.

Action brought for an injunction to restrain defendants from trespassing upon lot 35, in the 8th concession of the township of Hagarty, in the County of Renfrew, and to recover \$700, the value of 637 cedar, ash, spruce, and basswood trees, cut and removed, and \$200 damages for trespass.

T. W. McGarry, Renfrew, for plaintiff.

W. B. Craig, Renfrew, and R. C. McNab, Renfrew, for defendants.

LOUNT, J.—The plaintiff is patentee of the land in question, under the Free Grant and Homestead Act. The patent issued to him in April, 1885. He and his wife are Poles, unable to speak English, and not able to read or write. The agreement, under which defendants claim the right to cut and remove timber, purports to have been made and registered in December, 1887. It was made by plaintiff and his wife with one R. White, and purports for \$80, \$5 in cash and balance before removal, to sell all the standing trees on the lot. The document was executed by mark, in the presence of J. C. Thompson, then an agent of White, but now employed by defendants. White, within 2 years, cut certain pine trees, paying one-half the price the first year, and the other half the second year. In 1889, White and his brother, who were then in partnership, assigned to O'Meara for benefit of creditors, and in January, 1890, O'Meara, by registered deed, conveyed to one Dunlop "all the red and white pine trees and timber" on the lot, and the defendants, by mesne conveyances, are assignees of Dunlop.

The plaintiff says he did not make the agreement in question; that he agreed to sell only the pine for the consideration mentioned; that the agreement was made at the house of one August Blanc, who acted as interpreter, but could not read or write; that Thompson wrote out the agreement after it was made, and said it was the one just made, and he, plaintiff, then put his mark to it. Blanc corroborated

the plaintiff's evidence, as did Mary Blanc, then a girl of 9 years. Thompson merely says that the agreement was made at Blanc's house, but does not give further explanation, and does not deny the evidence of plaintiff, Blanc, or his daughter. Plaintiff's wife says that she never put her mark to the agreement, and that she was not present when it is said to have been made. I think the agreement set up by defendant is not the true agreement. *McNeill v. Haines*, 17 O. R. 479, is not the same as this case. . . . I think the alleged agreement is void, not voidable, and that defendants did not acquire any rights under it, to the trees in question; nor is there any equity in defendants' favour, certainly none as against earlier equity of plaintiff. Sec. 98 of the Registry Act cannot help defendants. I do not think the agreement can be upheld, owing to R. S. O. ch. 25, sec. 17. It is undoubtedly a sale of an interest in land: *Handy v. Caruthers*, 25 O. R. 280, citing *Summers v. Cook*, 28 Gr. 179, *McNeill v. Haines*, 17 O. R. 479, and *Lavery v. Purcell*, 39 Ch. D. 50. While I recognize that the evidence of the plaintiff and his wife, parties interested, should be scrutinized and accepted with great caution, I see, under all the circumstances of the case, no good reason for doubting their evidence, and, as the wife did not execute the agreement, it is void under sec. 17 of the Homestead Act. . . . Moreover the words "and timber" are *ejusdem generis*, and mean red and white pine timber, whether growing, standing or being on the lot: *Anderson v. Anderson*, [1895] 1 Q. B. 749. Judgment for plaintiff for \$78 in addition to the \$150 paid into Court, and injunction granted with costs. Counter-claim dismissed without costs.

McGarry & Devine, Renfrew, solicitors for plaintiffs.

Craig & McNab, Renfrew, solicitors for defendants.

FEBRUARY 12TH, 1902.

DIVISIONAL COURT.

CHEVALIER v. ROSS.

Amendment—Pleading—Diligence in Moving—Rule 312.

An appeal from the order of LOUNT, J., *ante* p. 12, was heard before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) and argued by the same counsel.

The judgment of the Court was delivered by

FALCONBRIDGE, C.J.—The filing of the memorandum according to form 53 (Rule 423) was a mistake, and a motion to rectify was made with all reasonable promptness. Emery

v. Webster, 9 Ex. 242, decided fifty years ago, when the practice was much stricter, is a stronger case than this, for there the money was taken out of court. Appeal dismissed with costs.

FERGUSON, J.

FEBRUARY 12TH, 1902.

TRIAL.

GLENN v. RUDD.

Master and Servant—Wrongful Dismissal—Construction of Agreement—Statute of Frauds—R. S. O. ch. 157, sec. 5.

Brace v. Calder, [1895] 2 Q. B. 253, applied.

Action, tried at London, brought to recover damages for alleged wrongful dismissal of plaintiff. The Raymond Company of Guelph manufactured National cream separators for defendants, who had the sole agency for Ontario, and traded as the Creamery Supply Company. The defendants appointed the plaintiff sole general agent for five western counties, and agreed that the contract between plaintiff and them should remain in force so long as the Raymond Company should continue to manufacture separators for defendants. Subsequently defendants dissolved partnership, and each taking half of the Province as his territory, continued in business, the Raymond Company supplying each with separators.

T. T. Macbeth, K.C., for plaintiff.

G. C. Gibbons, K.C., and J. J. Drew, Guelph, for defendants.

FERGUSON, J.—It is to me manifest that this contract must have come to an end, and, as to time, be performed at any time the Raymond Company should cease to manufacture the separators for the defendants. There was nothing to prevent their ceasing so to do at any time. The contract, therefore, might or might not be performed within the year. On this subject I refer to secs. 274, 275, and 276 of Browne on the Statute of Frauds, and Addison on Contracts, 9th ed., p. 34, where the author refers, *inter alia*, to McGregor v. McGregor, 21 Q. B. D. 424. I refer also to pp. 428 and 429, at which Lord Esher deals with Davey v. Shannon, 4 Ex. D. 81, and adopts Murphy v. Sullivan. I am decidedly of opinion that the Statute of Frauds has no application to the agreement in question, nor has R. S. O. ch. 157, sec. 5. The Raymond Company had not at or prior to the time of dissolution of defendants' partnership, ceased to manufacture separators for them. There was at that

period a valid parol agreement between plaintiff and defendants. According to the decision in *Brace v. Calder*, [1895] 2 Q. B. 253, the fact of the dissolution, which was of course the act of the defendants, operated as a wrongful dismissal of the plaintiff (or was a breach of the agreement) . . . The plaintiff seems to have been realizing about \$50 a month, and has not been able to obtain suitable employment, but has been able to make only trifling sums since his dismissal. I think he should not be put off with only nominal damages, nor yet recover heavy damages, and upon the best consideration I can bestow upon the matter, I arrive at the sum of \$300 as damages.

Judgment accordingly with costs on High Court scale.

Macbeth & Macpherson, London, solicitors for plaintiff.

Macdonald & Drew, Guelph, solicitors for defendants.

FEBRUARY 13TH, 1902.

DIVISIONAL COURT.

REX v. COLE.

Criminal Law—Incitement to Give False Evidence—Or Evidence Regardless of its Truth or Falseness—Misdemeanour—Single Justice—Grand Jury—Common Law—Criminal Code—Reputation—Bail—Estreat—C. Code, secs. 530, 641.

Motion by A. F. Bowman to make absolute a rule nisi calling upon the Attorney-General for Ontario to show cause why the estreat roll upon the recognizance of bail entered into by Oliver Cole and A. F. Bowman, and the writ of *fi. fa.* and *capias* thereupon issued, and all proceedings to estreat, should not be set aside and proceedings forever stayed. The defendant was committed for trial by A. Freeborn, a justice of the peace, upon an information charging that on January 7th, 1901, the defendant did, at the village of Southampton, in the county of Bruce, unlawfully attempt to incite, procure, counsel and induce one Sylvester Cole, unlawfully, willingly, and knowingly and corruptly to commit the crime of perjury, by swearing on the trial of a certain election petition then soon thereafter coming on to be heard of Campbell v. McNeill, that George Smith, C. E. Vanstone, James John, or the member elected for North Bruce, or some one of them, had corruptly paid him, Sylvester Cole, \$5 to vote for the said McNeill, whereas in fact and in truth no such offer had been made. The defendant was admitted to bail by the said justice of peace. The grand jury found thereafter a true bill, and defendant not appearing, the presiding Judge

at the Spring Assizes at Walkerton directed a warrant to issue for his apprehension, and ordered the bail to be estreated, giving effect to the contention of the counsel for the Crown; viz., that the charge was not one under secs. 120, 121, 146, 147, 148 to 152 of the criminal code as to perjury, for which defendant would be liable to imprisonment for five years, but that it came under sec. 530, under which defendant is liable to one year's imprisonment for inciting or attempting to incite any person to commit any offence under any statute for the time being in force, and not inconsistent with the code.

C. H. Ritchie, K.C., for Bowman.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J.) was delivered by BOYD, C.:—The offence as set out in the recognizance (the warrant not being before the Court) is not an attempt to commit the crime of subornation of perjury, as was argued, but something less, being an incitement to give false evidence, or to give particular evidence regardless of its truth or falsehood, which is a misdemeanour at common law, punishable by fine and corporal punishment: Russell on Crimes III., p. 3. In such a case it is competent for a single justice of the peace to commit for trial, and also to admit to bail, as at common law. It was competent for the grand jury to go beyond the charge contained in the magistrate's commitment if founded upon the facts or evidence disclosed on the depositions: C. Code, s. 641. As to any such variance the bail have no ground to complain, for they are bound in a sum certain, and not to stand in the place of the principal, and his failure to appear is the cause of the forfeiture of the recognizance: see *R. v. Ridpath*, 10 Mod. 152. The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law; *R. v. Carlile*, 2 B. & Ald. 161. But here, the offence as set forth in the recognizance is not specified in the Code, and the power of the justice may be exercised as at common law in liberating the prisoner into the hands of bailsmen. Rude *nisi* discharged with costs.

J. Frank Palmer, Walkerton, solicitor for Bowman.

MACMAHON, J.

FEBRUARY 13TH, 1902.

TRIAL.

THOMPSON v. KING.

*Vendor and Purchaser — Commission — Reopening Negotiation—
Agent's Advertising Expenses.*

Action tried at Ottawa, brought to recover a commission after sale of a house in the city of Ottawa by the defendant, through the instrumentality of plaintiff, as he alleges.

R. G. Code, Ottawa, for plaintiff.

W. D. Hogg, K.C., for defendants.

MACMAHON, J.—I do not think that it was through the instrumentality of plaintiff that the negotiations were reopened between the purchaser and defendant. The purchaser says that he had been negotiating with defendant to buy before plaintiff spoke of his being defendant's agent, and when plaintiff told him he was defendant's agent, he (Fielding) refused to discuss the matter further. The plaintiff therefore is not entitled to a commission. The nearest case is *Thompson v. Thomas*, 11 Times L. R. 304, but it is clearly distinguishable. On the authority of *Taplin v. Barrett*, 6 Times L. R. 30, and *Chiswick v. Salisbury*, 3 Times L. R. 258, the plaintiff may be allowed \$45, expenses incurred in advertising, for which there will be judgment for him, with Division Court costs. Defendant may set off the costs of the action.

Code & Burritt, Ottawa, solicitors for plaintiff.

O'Connor, Hogg, & Moyer, Ottawa, solicitors for defendant.

FEBRUARY 13TH, 1902.

DIVISIONAL COURT.

GAUL v. TOWNSHIP OF ELLICE.

Malicious Arrest and Prosecution — Constable — Acting Bona Fide Warrant Bad on its Face—Civil Action—Notice—Time—Municipal Corporation — Resolution of Council — Want of Malice Ultra vires—Funds for Prosecution—Liability of Individual Members—Justice of the Peace—Dominion Officials Enforcing Criminal Law—Not Within Respondent Superior.

Appeal by plaintiffs from judgment of County Court of Perth, in action for damages for malicious prosecution, false arrest, and imprisonment. The defendant corporation, in 1899, granted an application made by one James Hishon, on

behalf of himself and his neighbours, to clean out a spring on a highway, to be used for watering cattle. As soon as the spring was cleared, the plaintiffs filled it in. The defendant Murr, as a peace officer and constable, upon the complaint of one Hishon and others, laid an information against plaintiffs for having wilfully committed damage, injury, or spoil to or upon the highway. Plaintiffs allege that after the conviction, which was made by a Justice of the Peace, and which was entirely illegal to his and defendants' knowledge, and which he refused to enforce until indemnified by a resolution of defendant corporation to do so, the Justice issued his warrant to defendant Murr, and plaintiffs were wrongfully arrested, fined, and imprisoned. The Judge below held, that under sec. 15 *et seq.* of the Criminal Code, the defendant Murr, acting as a constable in pursuance of a warrant, was not a trespasser, because the conviction was bad; that acting without malice and reasonably, he was entitled to the protection afforded by R. S. O. ch. 88, as to notice of action, and time within which it must be brought, and that the defendant corporation were liable to repay the fine imposed.

J. P. Mabee, K.C., for plaintiffs.

G. G. McPherson, K.C., for defendants.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J.) was delivered by BOYD, C.—The defendant Murr is not liable. It is shown that defendant is a constable and acted as such, and he is entitled to all the protection extended by the law to public officers of the peace. The warrant being bad on its face, the officer is relieved under sec. 21 of the Code, but is still liable to civil action, but in regard to it he is protected by R. S. O. ch. 88, which is pleaded. The action has not been brought within six months, nor has notice been given: see also Code secs. 975, 976, and 980. *Ex p. Mc'lean*, 3 N. B. R. 100, is contrary to *Reg. v. Hefferman*, 13 O. R. 616. Then as to the corporation:—There is no proof as regards it, that the Council had the conviction or warrant before them, or that they had any knowledge of its illegality on the ground of a joint fine, and there is no proof that the Council was not acting *bona fide* for the protection of the spring on the highway. There is no evidence of malice. But assume that imputed knowledge of the invalid conviction and warrant is to be attributed to the corporation, then their resolution is *ultra vires*. It transcends the powers of municipal corporations to award funds for illegal purposes. The legal consequences of any illegal conduct must be visited on the offending members: Ferguson

v. Kinnoul, 1 Bell App. (Scotch) 662, Cornell v. Guildford, 1 Denio N. Y. 510, Pocock v. Toronto, 27 O. R. 639, Tyne-mouth v. Eby [1899], A. C. 293. The maxim respondeat superior on which McGorley v. St. John, 6 S. C. R. 531, proceeds, does not apply, for the constable and Justice were acting as Dominion officials in the enforcement of criminal law. Appeal dismissed with costs.

Mabee & Makins, Stratford, solicitors for plaintiffs.

McPherson & Davidson, Stratford, solicitors for defendants.

BOYD.

FEBRUARY 13TH, 1902.

FERGUSON.

DIVISIONAL COURT.

FORD v. HODGSON.

Vendor and Purchaser—Sale of Standing Timber—Vendor's Lien—Not Displaced by Cutting or Sale — If Timber Capable of Identification—Injunction.

Summers v. Cook, 28 Gr. 179, approved.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in action for injunction and a declaration that plaintiff has a lien for unpaid purchase money upon certain cordwood piled on lot one in the first concession of the township of Glamorgan, in the county of Haliburton. On September 29th, 1899, one G. St. George owned said lot, and one R. Scott owned another lot, and their agent made an agreement with one W. Edgar, to sell the timber and trees on both lots to him for \$400, payable \$100 cash, to be paid to Scott, a promissory note to him for \$100, and the remaining \$200 in two notes payable to G. St. George. Edgar, at the time, assigned his interest and endorsed the notes to one Jason Shaver, for whom he was agent. On November 28th, 1900, G. St. George sold and conveyed lot one to plaintiff, and assigned to him her right, title, etc., in the timber and trees, and in the agreement and notes. All the notes remain unpaid. Shaver cut and removed more than \$400 worth of timber, and has now piled on lot one about 250 cords of wood, which defendant alleges he has purchased, and was about to remove when the action was brought. By indenture, dated January 22nd, 1901, made by G. St. George (now Comber) to plaintiff, it was recited that by the former conveyance it was intended to grant him all the timber, etc., on the land, but such a grant was by inadvertence omitted, and is now thereby granted. The Chief Justice affirmed the decision of the local Judge at Lindsay, who granted the

injunction, and who followed *Mitchell v. McGaffey*, 6 Gr. 361, referred to in *McLean v. Burton*, 24 Gr. 1, by Spragge, C., at p. 136, in preference to *McCarthy v. Oliver*, 14 C. P. 290, and held that plaintiff was entitled to a lien. *Lavery v. Pursill*, 39 Ch. D. 508, *Summers v. Cooke*, 28 Gr. 179, and *McNeill v. Haines*, 17 O. R. 479, were also referred to. The local Judge also held that defendant had notice because he claimed title to the wood only through the contract, and he must therefore be assumed to have had notice of all it contained, and it showed \$200 of the purchase money (two of the notes) not to be then due, and that the taking of the notes was not an abandonment of the lien, referring to *Dart V. & P.* at p. 829, and cases there cited, and to *Mitchell v. McGaffey*, *supra*.

W. R. Riddell, K.C., for defendant.

R. J. McLaughlin, Lindsay, for plaintiff.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J.) was delivered by BOYD, C.—The appeal is concluded by authorities, binding on this count, in favour of the judgment pronounced at the trial. The sale of the timber, to be removed in three years by the purchaser, was of an interest in land, and in respect of which a vendor's lien arose by operation of law. This was not displaced by the cutting or sale of the timber as long as it could be identified and remained on the land. The remedy is by way of injunction and enforcement of lien on the property so identified, as was held in *Summers v. Cook*, 28 Gr. 179, and the earlier cases therein cited. Appeal dismissed with costs.

McLaughlin, McDiarmid, & Peel, Lindsay, solicitors for plaintiffs.

G. H. Hopkins, Lindsay, solicitor for defendants.

MEREDITH, J. . . . FEBRUARY 13TH, 1902.

CHAMBERS.

RE NEWBORN, TORONTO GENERAL TRUSTS CORPORATION v. NEWBORN.

Will — Construction — Election — Dower — Annuitant—Lapse—Intestacy—"Balance."

Summary application, under Rule 938, by the corporation, administrators with the will annexed of the estate of Richard Robinson Newborn, late of the township of Etobicoke, farmer, for an order declaring the true construction of the will, which was executed in 1892, and was in the testator's own handwriting, except some formal parts, which were printed in a common form, filled up by the testator, who died in 1900. In the will he gave annuities to his wife and

only child, but the latter predeceased him. The testator was illiterate; the will was not separated into sentences, nor punctuated. The material parts of the will are as follows:—"I give devise, and bequeath all my real and personal estate . . . in the manner following . . . I give to my wife \$200 per year as long as she remains my widow and to my daughter the sum of \$200 per year as long as she remains unmarried but in case she marries then she is only to receive \$50 per year the fifty taken off to go to my wife per year . . . And at her death the said \$150 is to go to the Toronto Home for Incurables until the farm is sold my wife and daughter to have and to hold the house and lot with furniture and chattels while they remain unmarried at the death or marriage of either of them it is to go to the other. But after the death or marriage of both the house and lot is to be sold and the money is to go to the Sick Children's Hospital in Toronto the above annuities are to be taken out of the farm rent . . . Any balance of money received from rent . . . is to go with the interest of what money is in the Permanent Building Society and interest annually divided equally between the Presbyterian Church at Mimico and the Toronto Home for Incurables until the farm is sold I here give the executors power to sell the farm in case of increased expenses or rise in property the amount to be invested in first mortgages the amount of interest required to be used in place of rent the balance of interest to go to the aforesaid two institutions until the death or marriage of my wife and daughter after the death of both \$1,000 goes to Presbyterian Church at Mimico and \$500 to the Protestant Orphans' Home the balance to be divided equally between the Home for Incurables of Toronto and the Sick Children's Hospital" The estate of the testator was substantially the same at the date of the will and at his death, and consisted of his farm, which was rented, a small lot and house where he lived, and \$2,600 which was deposited with the Canada Permanent Loan and Savings Company at the time the will was made, and at the death, with the Dominion Bank.

W. N. Ferguson, for the administrators.

W. M. Clark, K.C., for the Home for Incurables.

E. F. B. Johnston, K.C., for the Hospital for Sick Children.

Huson Murray, for the Protestant Orphans' Home.

J. D. Montgomery, for the widow.

S. H. Bradford, for two sisters of deceased.

E. W. J. Owens, for others interested.

MEREDITH, J.—The widow is put to her election between the provisions of the will in her favour and her dower. See *Hill v. Hill*, 1 Dr. & War. 94, *Thompson v. Burris*, L. R. 16 Eq. 592, *Amsden v. Kyle*, 9 O. R. 439, *Leys v. Toronto General Trusts Co.*, 22 O. R. 603. There is no authority for the contention that because the first annuitant died in the testator's lifetime, those who were to take at her death take nothing. The annuity is payable to them from the testator's death, but only \$150 a year. See *Hardwick v. Thurston*, 4 Russ. 383, *Edwards v. Saloway*, 4 DeG. & Sm. 248. There is no intestacy as to the additional \$50. Upon the facts, as found by the Judge, with regard to the money on deposit, there are no reasons impelling the conclusion that there is an intestacy as to the interest thereon, in the face of the testator's declaration that he disposes of all his property. There is no intestacy as to the corpus or any part of it. By the word "balance," the testator meant the rest or residue of the whole of his property. There is no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; this property is included also in the "balance."

Order made declaring accordingly, unless the findings as to the material facts are disputed, in which case an action or issue must be tried, and there will be no order upon this motion as to costs or otherwise. If order goes, costs of all parties out of the estate, those of the administrators as between solicitor and client.

FEBRUARY 15TH, 1902.

DIVISIONAL COURT.

BELLING v. CITY OF HAMILTON.

Municipal Corporation—Highway—Non-repair—Carriage-way—Foot-way—Different Standard of Repair—Finding of Fact by Trial Judge—Review of.

Boss v. Litton, 5 Car. & P. per Lord Denham, at p. 408. explained.

Appeal by defendants from judgment of County Court of Wentworth in action for damages. The plaintiff was crossing, in a diagonal direction, McNab street, at a point 30 feet distant from a crossing, when she slipped on the edge of a hole, about 2 feet square by 2 inches deep, in the asphalt pavement, and fell, sustaining injury. The evidence conflicted as to whether there was another hole in the pavement 90 feet away. The hole in question was 19 feet from

the curb, and 31 feet from the place where persons were in the habit of crossing. The trial Judge found that the accident was due to defendants' negligence in allowing the pavement to be and remain dangerously out of repair, considering the fact that the road is one of the busiest streets in Hamilton, and one over which hundreds of people are daily hurrying in all directions; that plaintiff had not been negligent; that the street was not sufficiently out of repair to be at all dangerous to horses or vehicles; and gave plaintiff \$150 damages.

J. P. Stanton, Hamilton, for defendants.

J. H. Long, Hamilton, for plaintiffs.

Judgment was delivered on February 15th, 1902.

BRITTON, J.—I agree fully with the statement of the Chief Justice, *infra*, that the finding of fact by a Judge ought to be viewed with at least as much respect as such a finding by a jury. What is actionable negligence under sec. 606 of the Municipal Act, by reason of default of a corporation to keep a street in repair, must be a question of fact depending upon a variety of circumstances. A general rule as to the kind or size of hole cannot be laid down. See as to kind of defects which do not constitute want of repair, *Ewing v. Toronto*, *supra*, and *Messenger v. Bridgetown*, 31 S. C. 379 . . . But this case turns on the finding of the trial Judge that "the roadway was not sufficiently out of repair to be at all dangerous to horses and vehicles." That is what the roadway was for. . . . Unless municipal corporations are to be insurers against accident, they ought not to be held liable for such a defect, and upon the facts as found by the Judge below. Upon this point I agree with my brother Street. The appeal should be allowed.

STREET, J.—It has been well settled by a long line of cases, that the duty imposed upon municipalities by R. S. O. ch. 223, is to keep highways in a reasonable state of repair, having regard to their situation, and the travel upon them. That is, that the highway is to be kept in such a state of repair, as that persons using it might reasonably expect to do so without danger: *Castor v. Uxbridge*, 39 U. C. R. 113, *Lucas v. Moore*, 3 A. R. 602, *Foley v. Flanborough*, 29 O. R. 139. The repair need not be perfect, nor the safety of persons using it insured. . . . A finding of fact by a Judge is to be treated with great respect, but, in the present case, we are not embarrassed in considering it by any conflict of evidence upon the really material questions. Besides, courts are in the habit of more freely reviewing findings of fact in

cases tried by a Judge alone, than in cases with a jury, *inter alia*, by reason of the expense and uncertainty, in the latter case, of a new trial, and I see no good reason why we should hesitate to review the judgment of a judge in a case against a municipality more than in any other case. . . . With the greatest possible respect I must express my opinion, that the finding, that this hole or depression is a breach of statutory duty to keep in a reasonable state of repair, carries the liability of corporations many degrees further than it has ever been carried before, and seeks to impose upon them a standard of perfection far beyond the reasonable state of repair which is the measure of their duty under the statute. The Judge below appears to have erred as to the standard, by basing it upon the decisions referred to at p. 911 of 2nd Edition of Elliott on Roads and Streets. All of which are founded on a dictum of Lord Denman's, at *Nisi Prius*, in *Boss v. Litton*, 5 Car. & P. at p. 408. . . . It does not at all follow from his language that there is a duty to keep carriage-ways and ways for foot passengers up to the same standard. . . . The degree of repair in which each is to be kept is to be measured by the use for which it is intended. The carriage-way was not out of repair, and it is erroneous to hold that it must be kept so as to ensure foot passengers against accident. That is a mistake in view of Lord Denman's remarks. . . . And so when the Judge below held that the carriage-way was not improperly kept, so far as vehicles are concerned, I think he put the plaintiff out of Court. Moreover, after a careful review of the evidence, I am of opinion that it is impossible to say that the condition of this roadway was such as to lead any reasonable man to foresee the remotest chance of danger to any person, either on foot or in a carriage, from the hole, and, therefore, the defendants were not guilty of negligence with respect to it: *Ewing v. Toronto*, 29 O. R. 197, *Burroughs v. Milwaukee*, 86 North West Reporter 159. . . . Because the line between a dangerous defect and one not dangerous is a difficult or impossible one to define, and a hard and fast rule cannot be laid down, it does not follow that the finding of the trial Judge must be accepted. We cannot, by such reasoning, refuse the responsibility of dealing with each case upon its own merits. . . . We are bound in each case to enquire, whether the defect in question was one from which a reasonable man would have apprehended danger.

The appeal should be allowed.

FALCONBRIDGE, C.J.—Inasmuch as the municipalities have secured legislation (to which they would seem to be in

nowise better entitled than railways or insurance companies or any other corporation) transferring the trial of certain actions for negligence from a jury to a Judge, it occurs to me, that the finding of fact of their chosen tribunal ought to be viewed with at least as much respect as that which is accorded to the finding of a jury, and unless we are prepared to hold, as a matter of law, that the depression or hole, which existed here, was not an actionable defect in the highway, the judgment ought to be upheld. I do not know of any Canadian cases which would compel us to so hold. There is at least one in the U. S. which would probably go that far, *Burroughs v. Milwaukee*, *supra*, but in considering these authorities, regard must always be had to the law relating to, and standard of maintenance of, highways of the particular place or state. I do not feel called on to generalize further in the present case. Whether the plaintiff using the highway was exercising ordinary care, was also a question of fact for the Judge. Proceeding on a way known to be defective is not necessarily inconsistent with reasonable care. A pedestrian is not guilty of negligence merely because he walks on the roadway, and he may cross a street at any point without waiting to reach a crossing: *Boss v. Litton*, *supra*, *Beven on Negligence*, Vol. 1, p. 659, *Thompson on Highways*, 1881, p. 441. In my opinion the appeal ought to be dismissed.

Appeal allowed with costs, and action dismissed with costs.

Lee, Farmer, & Stanton, Hamilton, solicitors for plaintiff.

Farmer & Long, Hamilton, solicitors for defendants.

FERGUSON, J.

FEBRUARY 15TH, 1902.

TRIAL.

BURKE v. BURKE.

Master and Servant—Liability of Master for Act of Servant—Trespass to Person — Forcible Removal of — By Owner from his House—Unnecessary Force—Continuation of After Removal—Continuous Act—Solicitor—Damages by Jury for Specific Acts — General Damages besides on Erroneous Assumption of Liability—Effect of.

Action, tried at London with a jury, brought to recover damages for assault by defendants, and for ejecting plaintiff from the house of M. J. Burke, an American Consul, at the city of St. Thomas, and using unnecessary violence in so doing.

E. Meredith, K.C., and P. H. Bartlett, London, for plaintiff.

J. A. Robinson, St. Thomas, for defendant Cook.

J. M. McEvoy, London, for defendant Burke.

Joseph Montgomery, for defendant Robinson.

FERGUSON, J.—The jury answered a series of questions and made assessments. By consent, any part or parts of the case, whether of law or fact, not fully covered by the findings, were to be considered and determined by me. The undisputed evidence shews that defendant Burke was some years ago appointed American Consul at St. Thomas, and that he invited plaintiff, his first cousin and foster-sister, then living in Chicago, to come and live with him in his family, while he would hold the office, a period of about four years. The plaintiff accepted the invitation, and parted with a little business she had, and went to St. Thomas. The authorities shew clearly that plaintiff, notwithstanding, had no legal right to remain in defendant Burke's home against his will, no matter how commendable her conduct while there may have been. . . . Personal differences arose, and defendant Burke consulted a lawyer, defendant Robinson, who requested plaintiff to leave Burke's house, and she declined, no doubt thinking that owing to his invitation, and her coming from Chicago in pursuance of it, she had a right to remain. Robinson, still acting for Burke, employed defendants, Cook and Donahue, giving them full instructions not to use unnecessary violence in removing plaintiff from the house, and not to act unless under Burke's instructions. Cook and Donahue went to Burke, and told him their instructions, and he told them to remove the plaintiff, and to act in accordance with Robinson's instructions. The plaintiff was removed accordingly and in Burke's presence. I do not think Robinson is liable. He acted as a solicitor. It was Burke, the master and owner of the house, who ordered the men to expel plaintiff. Donahue's name has been stricken from the record. Cook is the one, who actually removed plaintiff. The jury have found that unnecessary force was used, and have assessed the damages at \$200, and on the authority of *Ferguson v. Roblin*, 17 O. R. 167, and cases there collected, I think defendants Cook and Burke are liable for this sum. The jury have also found \$300 damages for what occurred after the plaintiff passed the boundary of Burke's house. She was put and held in a cab, and driven to a Mrs. Peters' house. The

evidence shows that what was done to plaintiff was one continuous act, and on the authorities referred to, *supra*, the defendants Cook and Burke are liable as joint wrongdoers. In answer to the eighth question put to them, viz.: Q. If the whole conduct if the defendants was wrongful, what damages do you give the plaintiff for this? The jury gave \$1,000. This was on the assumption by them that there existed no right whatever to remove the plaintiff from the house, and hence that the whole conduct from the beginning was wrongful. This assessment, based as it was upon an erroneous hypothesis, should have no effect whatever. The result is that the action should be dismissed with costs as against Robinson, and there should be judgment for plaintiff against defendants Burke and Cook for \$500 damages, with costs.

R. M. C. Toothe, London, solicitor for plaintiff.

McCrimmon & Wilson, St. Thomas, solicitors for defendant M. J. Burke.

H. B. Travers, St. Thomas, solicitor for defendant J. A. Robinson.

J. A. Robinson, St. Thomas, solicitor for defendant J. W. Cook.

STREET, J.

FEBRUARY 17TH, 1902.

CHAMBERS.

RE WATTS.

Criminal Law—Foreign Criminal Law—Presumption—Child-stealing by Father—Extradition Proceedings—Foreign Decree of Divorce—Collusion—Practice—Contempt of Court—Crim. Code, sec. 284.

Re Murphy, 26 O. R. 177, followed.

Motion, on return of writ of *habeas corpus* with *certiorari* in aid, for discharge of prisoner. The evidence shows that the prisoner was married to the complainant, Mary E. Watts, in 1895, in the State of Illinois, which was their domicil. A child was born in 1897, and in 1900 an absolute divorce on the ground of cruelty was granted to the complainant, and by terms of the decree, the prisoner was to be at liberty to see the child at all suitable times, but the custody was given to the complainant. The prisoner one day took the child and did not return it the same day, or the next, as usual, but took it out of the State of Illinois, and eventually brought it into Canada. The grand jury of

the county of Saugaman, Illinois, found a true bill against the prisoner, for that "he did wilfully and without lawful authority, forcibly and feloniously take and carry away one Catharine H. Watts, an infant under the age of 12 years, without the consent of the lawful custodian of such child, contrary to the form of the statute in such case," etc.; another count charged the same offence, leaving out the word "forcibly," and adding that the child was taken away with intent to deprive its lawful custodian of its custody. The prisoner was arrested and lodged in jail at Sandwich for extradition, and subsequently admitted to bail.

A. B. Aylesworth, K.C., and F. A. Anglin, for prisoner.

G. F. Shepley, K.C., for complainant.

STREET, J., held, following *Re Murphy*, 26 O. R. 177, that proof of foreign law by the complainant is unnecessary, and in absence of proof to the contrary on behalf of defendant, it must be assumed that the law relating to crimes scheduled to extradition act is the same in Canada as in the State of Illinois; also, that sec. 284 Crim. Code, as to child-stealing, is wide enough to cover this case; also, that objections to the validity of the foreign decree on the ground of collusion, and that prisoner acted in the *bona fide* belief of his right, are matters of defence open to prisoner on a trial, but not on these proceedings; and also, that the fact that the act charged may be a contempt of Court does not prevent it being also a crime. Prisoner remanded to custody.

Murphy, Sale, & O'Connor, Windsor, solicitors for prisoner.

Clark, Cowan, Bartlett, & Bartlett, Windsor, solicitors for complainant.

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MORSON, JUN.CO.J. FEBRUARY 17TH, 1902.

FIRST DIVISION COURT, YORK.

McCANN v. SLATER.

Parent and Child—Liability of Parent for Tort of Child Eight Years Old—Master and Servant—Isolated Act—Habitual Mischivousness—Knowledge of Parent—Division Courts Act, sec. 73.

Moon v. Towers, 8 C. B. N. S. 611, referred to.

Action for \$60 damages to a plate-glass window in the store No. 208 Dundas Street, Toronto, owned by the plaintiff, and caused by the defendant's son, eight years old, throwing a stone.

W. Howard Shaver, for plaintiff.

A. Fasken, for defendant.

MORSON, JUN.CO.J.:—There is no dispute as to the facts, and it did not appear why the child was on the street at the time or on what business (if any), for had he been on the defendant's business the result might have been different. The law seems to be well settled that, speaking generally, an infant, no matter how young, is liable for its own wrongful acts, and not the parent. It is also well settled law that in order to make one person, whether parent or not, liable for the wrongful act of another, whether child or not, the relationship of master and servant must exist between them, and the servant guilty of the wrongful or negligent act must at the time be acting in the employment of or on the master's business. The plaintiff in this case would therefore have to prove that the defendant's child was his servant. This, of course, would be a manifest absurdity in view of the child's tender years and its relationship to the defendant, and in the absence of any evidence of employment. There might be cases, however, under different circumstances as to age and otherwise, where this relationship of master and servant might be presumed to exist. In *File v. Unger*, 27 A. R. at p. 471, Mr. Justice Osler

says that in the case of a minor child living at home and old enough to perform work, this relationship might be presumed, but does not expressly so decide. Even if I could find it did exist, which I cannot, it would still have to be shewn that at the time of doing the damage, the child was on the defendant's business, as to which there was no evidence, and I would, therefore, have to find it was not. As to this relationship of parent and child I might appropriately quote the following from the judgment of Mr. Justice Willes in *Moon v. Towers*, 8 C. B. N. S. 615:—"I am not aware of any such relationship between a father and a son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else. I apprehend that when it is established that a father is not liable upon contracts made by his son within age, except they be for necessities, it would be going against the whole tenor of the law to hold him to be liable for his son's trespasses. The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the Courts."

The defendant in the present case is clearly then not liable, but the child alone is, notwithstanding the fact that it is only eight years old. In an American case, *Hutchinson v. Engel*, 17 Wis. 231, an infant of seven years old was held liable in trespass for breaking down shrubbery and flowers in a neighbour's garden. If the plaintiff had been able to shew that the defendant's child, of such tender years, had been in the habit of breaking glass or doing other damage, to the knowledge of its parent, who did not choose then to take ordinary care to see that it did not exercise its damaging propensities to the detriment of others, either by not allowing it out unattended or by keeping it in altogether,* I think I should have in such case held him liable, on the broad principle of equity and good conscience referred to in sec. 73 of the Division Courts Act, and so often invoked by me where administering strict law would work a hardship. In the absence of this knowledge, I do not think the law imposes any duty on a parent to see that his child of tender years is attended, when on the streets, in order to prevent it doing damage, but I think that when the parent knows of its mischievous or destructive habits he should be held responsible for all the damage it does, unless he takes reasonable steps to avoid it. For the reasons, then, that I have stated, I must give judgment for the defendant, but without costs.

* See interesting article in 85 L. J. 288, entitled "Children's Mischiefs."

OSLER, J. A.

FEBRUARY 17th, 1902.

C. A. CHAMBERS.

Re WATTS.

Criminal Law—Extradition—Habeas Corpus—Appeal—Single Judge of Court of Appeal—Jurisdiction as to Bail—Discretion—R. S. O. ch. 83—Judicature Act, sec. 54.

Motion on behalf of prisoner to admit him to bail pending an appeal from order of Street, J., (ante p. 129), upon return of a writ of habeas corpus, remanding him to custody for extradition. Pending the proceedings below, Britton, J., admitted, on consent, the prisoner to bail, on condition that in the event of his being remanded for extradition he would forthwith surrender himself to the keeper of the gaol at Windsor.

F. A. Anglin, for Watts.

G. F. Shepley, K.C., for complainant.

OSLER, J.A.:—An order should not be made, for it does not appear that the prisoner is in actual custody, and it is doubtful whether a Judge of the Court of Appeal has power, on an appeal to the Court of Appeal under R. S. O. ch. 83, to admit to bail, such a matter not being incidented to the appeal, and so capable of being dealt with by a single Judge under sec. 54 of the Judicature Act. Moreover, if it rested in discretion to grant bail, one would be slow to admit to bail a person who has been committed for extradition, but upon the power of the full Court to do so, I do not for a moment reflect.*

FEBRUARY 17th, 1902.

DIVISIONAL COURT.

WILLIAMS v. COOK.

Sale of Goods—Contract—Failure to Supply Goods Contracted for—Breach—Guaranty—Remedy—Division Court Action—Bar after Judgment but not after Settlement before Trial.

Appeal by defendant from judgment of MACMAHON, J. Action to recover damages for breach of contract to deliver two dynamos, the breach alleged being that they were second hand and inferior in quality to those contracted for, and for other breaches. Defendant denied the breach, and alleged that plaintiff had bought the dynamos with a guarantee, which had been complied with, and that plaintiff had brought an

* On February 19th, the pending appeal came on for hearing before the full Court, which expressed a doubt as to the jurisdiction to admit to bail in extradition cases, and refused to hear the appeal until the condition of the bail bond had been complied with, and the appellant was shewn to be in close custody.—ED.

action in a Division Court for the same breaches of the contract as set up in this action, and that a settlement of all matters in dispute in that action was had, the action withdrawn, a delivery made of certain fixtures, and payment of moneys made, and a release given of a claim by defendant for \$75, in full discharge and satisfaction of all claims under the contract. Defendant also alleged that the dynamos were fit for their intended purpose, and that plaintiff had after a fair trial accepted and paid for them.

J. T. Garrow, K.C., for appellant.

W. Proudfoot, Goderich, for plaintiff.

The Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held, BRITTON, J., dissenting, as follows:—The following are the material parts of the contract:—“Henry Cook, please ship to my address two Manchester-type dynamos The dynamos must be manufactured by the United Electric Co. of Toronto, and their latest improved compound two-field type machine must be furnished, and guaranteed against any inherent defects due to bad workmanship or material for one year after starting. The manufacturing company’s guarantees to be taken by you. . . .” Plaintiff repeatedly complained about the way the machines were working. On 24th October, 1900, he brought an action in a Division Court against defendant for not supplying him with one volt and other articles, claiming \$100. The action should have come on for trial on 5th November, 1900, but before that date plaintiff agreed to withdraw it upon certain terms. Afterwards plaintiff alleges he, for the first time, discovered that the dynamos were second hand, and he then commenced this action. The Judge at the trial found that the bargain made was for new dynamos, and not for second hand ones, and that plaintiff was entitled to \$50 for certain articles not supplied to him. We, after several times reviewing the evidence, agree with his findings, but it is necessary to consider the legal objections raised by defendant. He urged that the plaintiff’s right to recover was, under the terms of the contract, limited to the guarantee or promise of the defendant contained in the contract to correct “any inherent defect in the machines, due to bad workmanship or materials, for one year from starting.” But this is not an action upon any guarantee, either express or implied, but for damages because the thing supplied to plaintiff was not the thing he contracted for, but something different, and of less value, and he can now maintain this action: *Chanter v. Hopkins*, 4 M. & W. 399, 404; *Gosling v. Kingsford*, 13 C. B. N. S. 447; *Azeman v. Casella*, L. R. 2 C. P. 431; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Shepherd v. Kain*, 5 B. & Ald. 240; *Cowdry v.*

Thomas, 36 L. T. N. S. 22; May v. McDougall, 18 S. C. R. 700. The contract, as we construe it, was for new dynamos, and it was not satisfied by the delivery of the old ones repainted. The right to recover damages for a difference of this kind is something entirely distinct from the right of action upon the guarantee, that being accepted upon the fundamental understanding that the thing contracted for should be supplied: Bowes v. Shand, 2 App. Cas., per Lord Blackburn at p. 480. The plaintiff, upon the weight of evidence, is entitled to the \$50 assessed at the trial, for, though the articles not supplied were in question in the Division Court action, they were never supplied pursuant to the settlement. That settlement might have been an answer to the whole cause of action, if it had gone to trial or judgment: Wright v. London Omnibus Co., 2 Q. B. D. 271; Bruntsden v. Humphrey, 14 Q. B. D. 141; Nelson v. Couch, 15 C. B. N. S. 99; but, it did not, and the question as to what was covered by the settlement is one of fact, and we find on the evidence that no right of action for damages for breach of the contract to deliver new dynamos, that breach not being in fact known to plaintiff, or for warranty as to their working, was included in that settlement: Lee v. Lancashire R. W. Co., L. R. 6 Ch. 527.

Appeal dismissed with costs, BRITTON, J., dissenting.

Proudfoot & Hayes, Goderich, solicitors for plaintiff.

Garrow & Garrow, Goderich, solicitors for defendant.

FERGUSON, J.

FEBRUARY 18TH, 1902.

TRIAL.

SHARKEY v. WILLIAMS.

Sale of Goods—Conditional Sale—Hire Receipt—Removal for Non-payment.

Action, tried at Ottawa, brought to recover damages for illegal seizure and removal of a piano, which plaintiff had purchased from defendants on the usual hire receipt plan, and which, upon three payments of \$5 each becoming in arrear, they removed from her premises, on 7th July, 1901. The contract provided that the purchase money was to become due on default of any payment, and defendants' agent demanded \$115 balance due, and, not receiving it, removed the piano. Subsequently the defendants gave back to plaintiff's agent the piano and received the payments in arrear and \$5 costs of removal, the latter under protest.

P. H. Bartlett, London, and R. M. C. Toothe, London, for plaintiff.

E. Meredith, K.C., and J. O. Dromgole, London, for defendant.

FERGUSON, J., after a careful perusal of the evidence, held that defendants had not done anything which they were not entitled to do under the contract. Action dismissed with costs.

R. M. C. Toothe, London, solicitor for plaintiff.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for defendants.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

Re GLENN.

REX v. MEEHAN.

Justice of the Peace—Refusal to take Information—Order nisi—Forum—Single Judge—Divisional Court—R. S. O. ch. 88, sec. 6—R. S. O. ch. 223, sec. 193 (f).

Orders *nisi* under R. S. O. ch. 88, sec. 6, to compel any justice of the peace to do an act relating to his duties as such justice, are not final, but appealable, and the application for such orders must be made to a Single Judge sitting as the High Court, and not to a Divisional Court.

Motion by A. D. Turner to make absolute an order *nisi* calling upon James Morrison Glenn, K.C., police magistrate for the city of St. Thomas, to shew cause why a mandamus should not issue commanding him to receive the oath of Turner to a certain complaint in writing, preferred by Turner against Patrick Meehan, not couched in the exact wording of sec. 193 (f) of the Municipal Act, and charging defendant with, after having voted once at the election of mayor and aldermen for the city of St. Thomas in January, 1902, applying at the same election for a ballot paper in his own name, contrary to the said section.

I. F. Hellmuth, for Turner.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

E. E. A. DuVernet, for magistrate, objected that the motion under R. S. O. ch. 88, sec. 6 should be to a single Judge in Court. The motion was heard subject to the objection.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by—

STREET, J.:—The order *nisi* and the order absolute provided for by R. S. O. ch. 88, sec. 6, are civil, not criminal, proceedings, although the act which the justice is ordered to do may be, as here, the taking of an information for a criminal offence, and although the proceedings are taken in the name of the King. It is, therefore, to the Judicature Act and Rules of Court, taken along with the section above quoted, that we must look in order to ascertain the tribunal

in which the proceedings are to be taken, that is to say, in order to ascertain what is meant by the High Court in the section. If this application is one of the matters assigned by the Judicature Act, sec. 67, or by any Rule of Court to be heard by a Divisional Court, it is properly before this Court. It could only be so under sec. 65 (a), which assigns "proceedings directed by any statute to be taken before the Court, in which the decision of the Court is final," that is, not appealable. Now, though no appeal is given by sec. 6, the order is in fact in the nature of the former writ of prerogative mandamus, and of the present order of mandamus granted upon motion under the Judicature Act and Rules, which is clearly a matter in which an appeal lies. There is, therefore, no apparent reason why an order made under the section in question should not take its place alongside orders of a similar character and fall under sub-sec. 1 of sec. 75 of the Judicature Act. The fact that the order may be made under sec. 6 by a County Court Judge is not of consequence, because, by R. S. O. ch. 55, sec. 52, an appeal from his order is given. Therefore, orders under sec. 6 are not final, but appealable, and should be made before a single Judge sitting as the High Court. The matter, however, has been fully argued, and by consent of parties a further argument may be unnecessary. If consent is forthcoming within one week, judgment upon the merits will be delivered by a single member of this Court; otherwise the rule *nisi* will be discharged without costs, and without prejudice to a further application to a single Judge in Court.

McLean & Cameron, St. Thomas, solicitors for Meehan.

McEvoy & Perrin, London, solicitors for complainant.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

SUMMERS v. COUNTY OF YORK.

Municipal Corporation—Highway—Guard at Approach to Bridge—Negligence of Electric Street Railway Company—No excuse for Corporation.

Foley v. East Flamborough, 26 O. R. 43, approved.

Hill v. New River Co., 9 B. & S. 303, referred to.

Atkinson v. Chatham. 31 S. C. R. 61, distinguished.

Appeal by defendants from judgment of County Court of York in action for damages for injuries. The plaintiff was driving a team of horses, attached to a waggon. As he was crossing the bridge on Yonge street at York Mills an electric car approached, and plaintiff jumped out and held the head of the horse nearest the car, and alleges that he

would have been able to control both horses, but they were further terrified by the rumbling sound of the car as it entered on the bridge, and they dragged him in a south-westerly direction across the railway tracks to the top of a bank six feet high, when he had to let go, and the waggon and horses went over into the ditch. The Judge below held that plaintiff was not guilty of negligence; that the neglect of duty, if any, of the railway company would not excuse defendants for not properly guarding the highway: *Hill v. New River Co.*, 9 B. & S. 303; and that the highway was out of repair by reason of there not being a guard rail along the bank, thus bringing this case within *Toms v. Whitby*, 34 U. C. R. 195.

C. C. Robinson, for defendants.

J. H. Moss for third parties, the Metropolitan Railway Company.

W. Cook, for plaintiff.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by—

BRITTON, J.:— . . . It is true the horses were uncontrollable, but from a cause which the corporation might expect, and so should reasonably guard the highway at such a spot. I think the plaintiff acted carefully and prudently. Had he remained in his waggon, it would have been said he should have got out, and gone to the horses' heads. In *Atkinson v. Chatham*, 31 S. C. R. 61, the horses were uncontrollable and ran against a telephone pole, but the pole did not occasion any damage; it rather, as suggested by the Court, by separating the horses from the vehicle, saved further damage: *Foley v. East Flamborough*, 26 O. R. 43, covers this case. Appeal dismissed with costs.

LOUNT, J.

FEBRUARY 19TH, 1902.

WEEKLY COURT.

GRAHAM v. BOURQUE.

Contract—Breach by Non-payment of Note—Absolute Refusal to Perform—Necessity of, before Other Party can Rescind in Such Case.

Furth v. Barr, 9 C. P. at pp. 213, 214, referred to.

Appeal by defendants from report of the County Judge of Carleton, to whom the matters in dispute were referred under R. S. O. ch. 62, sec. 29, in action for price of goods sold and delivered. The contract was for delivery of a quantity of bricks subject to approval of engineer of city of Ottawa, and to requirements of defendants. The Judge below found that defendants had made default in payment of a promissory note for \$1,750, which fell due on July 17th, 1900, and which had been given by defendants for bricks delivered under the

contract, and that this default was conclusive evidence that defendants were unable or unwilling to make payment, and in either case that plaintiff was justified in assuming that defendants did not intend plaintiff or themselves to be bound by the contract.

J. A. Ritchie, Ottawa, for defendants.

W. A. D. Lees, Ottawa, for plaintiff.

LOUNT, J.:—The question raised is whether, if one party breaks a contract, the other is bound to perform his part of it. See *Furth v. Barr*, 9 C. P. at p. 213 per Lord Coleridge, and *Keating, J.*, at p. 214. With all respect, I think the learned Judge erred in law as well as in his finding on the facts. It is not sufficient that the defendants were unable to pay or wished to delay payment. It must be found that there was an intention to abandon by defendants and a refusal to perform, or, as *Keating, J.*, put it, there must be "an absolute refusal to perform their part of the contract." In my opinion the evidence falls short of this. . . . Refer to *Mersev Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, and 9 App. Cas. 434.

Judgment for plaintiff for \$100.10, with costs of action, except costs of counterclaim, and for defendants for costs of counterclaim. Costs of appeal to defendants.

Lees & Kehoe, Ottawa, solicitors for plaintiff.

Belcourt & Ritchie, Ottawa, solicitors for defendants.

FEBRUARY 20TH, 1902.

WEEKLY COURT.

Re CAMPBELL AND HORWOOD.

Will—Construction—Power to Sell—Executors—Real Estate Undisposed of—Intestacy—Vendor and Purchaser—Doubtful Title.

Alexander v. Mills, L. R. 6 Ch. at p. 131, followed.

Motion under Vendors and Purchasers' Act for an order declaring that the title of the vendor to lot No. 6 on the north side of McLeod street in the city of Ottawa is one which the purchaser is bound to accept. The vendor derives title by conveyance from the sole acting executor of Colin Campbell, deceased.

M. J. Gorman, Ottawa, for vendor.

D. L. McLean, Ottawa, for purchaser.

LOUNT, J.:—By a deed of the 9th April, 1900, G. D. Campbell, sole acting executor of estate of Colin Campbell, deceased, conveyed to the vendor the lot. Paragraph 3 of the will of the testator dated 28th December, 1875, provides that all his book debts are to be collected and the moneys arising therefrom to be invested as follows:—"All moneys are to be invested in bank stocks or city corporation bonds. All

mortgages and judgments that the interest is not paid on are to be foreclosed and closed in earnest; if the real estate will not sell for its worth, it can stand until the executors see a chance to dispose of it to advantage: moneys from the sale to be invested as before mentioned." And by paragraph 4, after providing for certain bequests and legacies, he devises certain of his real estate absolutely to his son Douglas, and a life estate to his wife in the dwelling house, subject to conditions, and then says, "and the residue of the estate or the interest arising from all invested moneys after the debts are paid is to be equally divided among my six daughters . . . for their sole use and benefit, and by them not to be conveyed during their natural lives, the interest only as the principal must be kept invested as before mentioned and used as I have instructed."

There is no other provision in the will giving the executors power to sell or dispose of the real estate.

The words "if the real estate will not sell for its worth it can stand until the executors see a chance to . . . dispose of it to advantage," do not empower and authorize the surviving executor to execute a deed to the vendor so as to give her a good title. The rule as to the construction of wills requires that I should give to the words their full and natural meaning, and that I should endeavour to arrive at the meaning and intention of the testator as expressed. On its face it is apparent that it was not drawn by a person having any knowledge or experience in the drawing of wills, but as it was drawn by the testator one presumes the words used are intended to express his mind and wishes . . .

Paragraph 3, read with the whole context of the will, was not intended to confer or give power to the executors to deal with any other real estate than that on which he held mortgages, for he disposes of his other real estate as provided in the 4th paragraph, and by this paragraph, after certain gifts, legacies, and devises, he gives the residue of his estate to his daughters not to be conveyed during their natural lives, which residue, I think, relates to the residue of his personal estate and not his real estate, for he uses these words:—"The interest only, as the principal must be kept invested as mentioned." Reading the whole of this paragraph, it seems to me he was dealing only with the personal estate. This would leave an intestacy as to the lot in question.

It is also contended that the title of the daughters and all the heirs passed under a deed of release of the 15th February, 1883. I think this is not so. No doubt it was intended that a deed should have been executed by those parties to the vendor's husband in trust for his and her children, but for some reason this was not done, and the only estate the vendor and her children can have is an equitable one.

A doubtful title cannot be forced on an unwilling purchaser: *Alexander v. Mills*, L. R. 6 Ch. at p. 131. Motion dismissed with costs.

M. J. Gorman, Ottawa, solicitor for vendor.

D. L. McLean, Ottawa, solicitor for purchaser.

Moss, J.A.

FEBRUARY 21ST, 1902.

C. A.-CHAMBERS.

KIDD v. HARRIS.

Leave to Appeal—Special Circumstances.

Thuresson v. Thuresson, 18 P. R. 414, referred to.

Application by defendants J. & C. Harris for leave to appeal from the decision of a Divisional Court (22 C. L. T. Occ. N. 25) affirming (for different reasons) the judgment of *FERGUSON, J.*, at the trial in favor of plaintiff in an action to establish the will of *Hebron Harris*, deceased.

H. M. Mowat, K.C., for the applicants.

G. E. Kidd, Ottawa, for plaintiffs.

A. Mills and J. H. Spence, for the other defendants.

Moss, J.A.:—Although the applicants have the judgment of two tribunals against them, they have the opinion of one Court only in respect of either branch of the case, and as the value of the estate is large, and as the consequences of the decision of the Divisional Court to the applicants in relation to their status and position are most serious, sufficient special circumstances have been shewn to entitle them to obtain the opinion of this Court upon the case. Security should not be dispensed with: see *Thuresson v. Thuresson*, 18 P. R. 414. Order made for leave to appeal upon the usual terms. Time for giving notice of appeal extended for two weeks. The appeal to be entered for argument at the next sittings. Costs in the appeal.

FEBRUARY 22ND, 1902.

DIVISIONAL COURT.

FRASER v. GRIFFITHS.

Mechanic's Lien—Registered Owner—Contract With—Transfer of Property after Registration of Lien, &c.—But Pursuant to Previous Agreement—Notice—Parties.

Appeal by defendants Griffiths, Davidson, and Ray from a judgment of the Judge of the District Court of Rainy River in a mechanic's lien action, declaring the plaintiff entitled to a mechanic's lien upon certain land for \$844 debt and \$185 costs, and ordering the lands to be sold in case of default of payment, and that the defendants Griffiths and Davidson should pay the deficiency on such sale, if any, and

ordering the defendant Mamie Ray to pay the costs of her counterclaim.

W. M. Douglas, K.C., for appellants.

C. A. Masten, for plaintiff.

The Court (FALCONBRIDGE, C.J., and STREET, J.):—Held, that the evidence fully justified the judgment appealed from, both as to the original contract and the extras. It was not necessary that Mamie Ray should have been added as a party at all, because there was no evidence that the plaintiff had any notice of the contract under which she claimed title, and she registered her conveyance long after the registration of the *lis pendens* in the present action. Under these circumstances, the interest she took was subject to the proceedings in the action, and no notice at all need have been taken in the action of the fact that she had acquired title from Griffiths and Davidson. Appeal dismissed with costs.

McLennan & Wallbridge, Rat Portage, solicitors for plaintiff.

W. B. Towers, Rat Portage, solicitor for defendants.

STREET, J.,

FEBRUARY 22ND, 1902.

WEEKLY COURT.

Re PUBLISHERS' SYNDICATE—MALLORY'S CASE.

Company—Winding-up—Subscription for Shares—Condition—Allotment—Notice—Contributory.

Appeal by M. B. Mallory from a judgment of Mr. Winchester, official referee, sitting for the Master in Ordinary, in a winding-up matter, settling the appellant's name upon the list of contributories as the holder of five shares of unpaid stock in the company. One Stark was an agent of the company, and was authorized to obtain subscriptions for its shares, being paid by a commission. Under his solicitation Mallory signed and handed to him an application for five shares, with the understanding that the application was subject to a condition (not appearing on its face) that Mallory was not to be required to accept any allotment that might be made unless and until he should collect a sum of about \$700 then due him. This condition was communicated to the president of the company, to whom the application was handed by Stark, either at the time of so handing it or shortly afterwards. The board of directors allotted five shares to Mallory upon the application being laid before them. There was no evidence of any formal notice of allotment being given to Mallory; he never paid any money upon the shares, and never attended a meeting of the shareholders, or in any way

acted as if he were a shareholder. He never collected the \$700 upon which he had relied as a means of paying for the shares. He was twice asked by persons sent on behalf of the company whether his money had come in and whether he intended to take or pay for the shares, and on each occasion he gave the messenger to understand that his money had not come in and that he would be unable to take them. Finally he told the president that he had failed to collect his money and would not take the shares, and was told that it was all right.

W. E. Raney, for Mallory.

C. D. Scott, for liquidator.

STREET, J.—Held, that the company had never notified Mallory that they accepted his offer to take the shares, and that he withdrew his application when he told the president that he would not take them. The fact that a condition accompanied the application was a sufficient reason for the absence of inquiry on the part of Mallory as to the fate of his application. See Pellatt's Case, L. R. 2 Ch. 527; Shackelford's Case, L. R. 1 Ch. 566; Gunn's Case, L. R. 3 Ch. 40; Rogers's Case, ib. 634; and Ex p. Fox, 11 W. R. 577.

Raney, Mills, Anderson, & Hales, Toronto, solicitors for Mallory.

Scott & Scott, Toronto, solicitors for liquidator.

FEBRUARY 12TH, 1902.

CHAMBERS.

LANGLEY v. LAW SOCIETY OF UPPER CANADA.

Parties—Adding Parties—Joinder of Causes of Action—Relief Over—Third Party—Rules 185, 186, 187, 192.

Evans v. Jaffray, 1 O. L. R. 614, Tate v. Natural Gas Co., 18 P. R. 82, and Confederation Life Association v. Labatt, 18 P. R. 266, followed.

Smurthwaite v. Hannay, [1894] A. C. 494, Thompson v. London County Council, [1899] 1 Q. B. 840, and Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, distinguished.

The plaintiff, as liquidator under the Winding-up Act of a company called the Publishers Syndicate, Limited, carried on this action, commenced by that company, to recover the sum of \$346 alleged to have been due by the Law Society to the firm of Rowsell & Hutchison, and to have been assigned to the company by E. R. C. Clarkson, as assignee for the benefit of the creditors of Rowsell & Hutchison. The Law Society pleaded that they had not become indebted to the

firm of Rowsell & Hutchison in any sum whatever in respect of the matters in question, and, in the alternative, that if they had become indebted, they had, before the assignment by Clarkson of the company, a right of set-off against Rowsell & Hutchison on other accounts to a much higher sum, and they denied the validity of the alleged assignment by Clarkson to the company. The plaintiff then applied for leave to add Clarkson as a defendant, alleging that he had warranted the existence of the debt, and Clarkson applied at the same time, in the event of his being added, for leave to serve a third party notice on the Bank of Hamilton, alleging that in assigning the debt to the company he had acted as agent for the bank and had paid the proceeds to them. The Master in Chambers granted both applications, and an appeal by the Law Society was argued before MEREDITH, J., on the 10th January, 1902.

Hamilton Cassels, for appellants.

George Bell, for Clarkson.

C. D. Scott, for plaintiff.

MEREDITH, J.—The questions for consideration are, whether the Master had power to make such an order, and, if so, whether he ought to have made it. The first step in the trial will be the determination of the question whether the defendants, the Law Society, are indebted as alleged, and in that all parties are directly concerned. . . . Again, the Law Society are directly concerned with each of the other parties in some of the matters in issue. . . . And lastly, there can be no wrong, nor need there, indeed, be any inconvenience to the alleged debtors in a trial of the action with the added parties. . . . The order ought to be upheld if the practice warrants it. . . . Rules 186, 192, and 187, read together, seem to me broad enough to cover this case.

If the Master's order cannot stand, I am unable to perceive how the law of *Tate v. Natural Gas and Oil Co.* (1898), 18 P. R. 82, can have been well decided. It is the judgment of a Divisional Court of the High Court, affirmed by the Court of Appeal. It seems to me to give even a broader effect to the Rules than is necessary to sustain that order.

And it is, I think, supported by such cases as *Honduras R. W. Co. v. Tucker* (1877), 2 Ex. D. 301; *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464; *Child v. Stenning* (1877), 5 Ch. D. 695, and *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504.

It is not necessary that I should discuss cases of less authority than these, which (if there be any) conflict in principle with these.

And of those of equal or greater authority it is needful to refer to two only.

Of *Smurthwaite v. Hannay*, [1894] A. C. 494, it may perhaps be enough to say that that was a case of misjoinder of plaintiffs, a case to which Con. Rules 187 and 192 were inapplicable; but it was also a case in which it was held that the claim of each plaintiff was upon a contract separate and distinct from that of each of the others. There was no connecting link between any of the claims, though they were all against the same defendants, and arose out of, mainly, the same circumstances.

The case of *Thompson v. London County Council*, [1899] 1 Q. B. 840, is the strongest for the appellants, but that was held to be a case of joining two separate and distinct actions for different wrongs against different defendants. And in that case the case of *Bennetts v. McIlwraith* was not found fault with, but was spoken of with approval.

The effect of the *Smurthwaite* and *Thompson* cases is lucidly exemplified by *Romer, L.J.*, in the *Frankenburg* case.

Neither the *Smurthwaite* nor the *Thompson* case is in fact or in principle like this case, but the case of *Bennetts v. McIlwraith*, in a measure, is.

Of the latest cases in this Court, *Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 606, was governed by the *Thompson* case. . . . But in this case relief over is sought, and, in addition, there is the connection between all the parties which the transfers of the alleged debt made. All claims are upon contract and in respect of the same subject-matter.

And *Evans v. Jaffray*, 1 O. L. R. 614, is a strong case of allowing a joinder of defendants and causes of action: and one which is more than merely broad enough to support the order here in question.

The contention that the practice as to joinder of defendants stands in the same position as that of joinder of plaintiffs did before the amendment of Con. Rule 185, because Rule 186 was not also amended, seems to me quite fallacious. It leaves out of consideration altogether the important Rules 187 and 192.

It would be a curious anomaly if several plaintiffs might sue one defendant, whilst one plaintiff might not sue several defendants, under the like circumstances.

The reason Rule 186 was not changed to correspond with the change in Rule 185 was, I have no doubt, that the combined effect of Rules 186, 192, and 187, was at least as wide as Rule 185 in its present form is: and in its present form it is quite wide enough to cover this case, which is one arising out of the same series of transactions, and in which there is some common question of law or fact.

Mr. Bell's contention that the assignor ought not to have been made a party, because, as he contends, the assignor was acting merely as agent of the Bank of Hamilton, raises a question of fact proper for consideration at the trial, not upon this motion: see *Tate v. Natural Gas and Oil Co.*, 18 P. R. 82.

The case of *Confederation Life Association v. Labatt* (1898), 18 P. R. 266, is authority for the third party notice.

The Master's ruling is affirmed; and the appeal will be dismissed; costs in the action to the plaintiff only.

Scott & Scott, Toronto, solicitors for plaintiff.

Cassels, Cassels, & Brock, Toronto, solicitors for defendants.

Thomson, Henderson, & Bell, Toronto, solicitors for added party.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

MORPHY v. COLWELL.

Attachment of Debts—Assignment of Debt—Attack within 60 Days—Pressure—Evidence—R. S. O. ch. 147—Division Courts.

Molsons Bank v. Halter, 18 S. C. R. 88, and *Stephens v. McArthur*, 19 S. C. R. 446, followed.

Appeal by the claimant, J. D. Smith, from a judgment of the Judge presiding in the 1st Division Court of Middlesex, refusing a new trial and thereby affirming his own judgment setting aside, as an unjust preference, a transfer to him from the primary debtor Colwell of a claim against the Northern Life Assurance Co., who were garnishees.

The summons was issued in the Division Court on 22nd January, 1900; the primary creditor, Morphy, claimed from the primary debtor, Colwell, the sum of \$200 upon a due bill dated 1st March, 1894, and all debts due from the Northern Life Assurance Co. to Colwell were attached. On the 7th December, 1899, Colwell had recovered a judgment against the garnishees for \$450, and on the same day he

assigned that judgment to James D. Smith, the present appellant. There is nothing to shew that any formal notice of the proceedings or of any contest as to his rights was ever served upon Smith, but he appeared in the proceedings by his solicitor on the 6th July, 1900, and consented to an adjournment of them, and upon the hearing of evidence which took place between all the parties and for all the purposes of their contest between themselves on 24th October, 1900. The learned Judge, after hearing the evidence, held that the commencement of the action having been within 60 days after the transfer to the claimant, the proceedings to set aside the assignment must be taken to have then begun, although the claimant was not made a party to them; that in any event there was no evidence that the assignment was the result of pressure; he gave judgment for the primary creditor against the primary debtor for \$200 and costs, and against the garnishees for \$200 and the costs. The claimant applied to him for a new trial, and upon his application being refused, he appealed.

The appeal was heard on the 23rd January, 1902, before FALCONBRIDGE, C.J., and STREET and BRITTON, JJ.

W. H. Blake, for the appellant.

J. M. McEvoy, London, for the primary creditor.

The learned Judge in the Court below has held that, because the garnishee summons was issued against the primary debtor and the garnishee within sixty days of the making of the transfer in question, the transfer must be held to have been attacked within the sixty days, and consequently that its validity cannot be supported by proof of pressure in procuring it.

In this view I am unable to concur. The transfer cannot be taken to have been attacked until proceedings against the transferee for the purpose are begun, and there is not the slightest evidence that the transferee here, J. D. Smith, was in any way notified of the proceedings or made a party to them, until he appeared in them by his solicitors on 9th July, 1900, the transfer in question having been made in the previous December. I am of opinion, therefore, that we must hold that no proceedings to impeach or set aside the transfer were made until after the expiration of the statutory period of sixty days. Then the question arises whether there is evidence of pressure by the claimant sufficient to enable us to hold upon the authorities that the preference obtained by the claimant was not a mere voluntary act, and therefore an unjust preference under the Act. . . .

In short it appears from the evidence both of Smith and Colwell, that Smith had asked Colwell for security shortly before the security was given, and that the security given was that which was promised. This, I think, is sufficient upon the authorities to constitute pressure inducing the giving of the security: *Molsons Bank v. Halter*, 18 S. C. R. 88; *Stephens v. McArthur*, 19 S. C. R. 446.

The result will be that the claimant should be held entitled to be paid his debt first out of the moneys realized from the judgment which has been assigned to him. He has paid, it appears, \$263.61, and he will be entitled to interest upon this sum and to his costs here and below.

The primary creditor will be entitled to judgment against the garnishees for the surplus over Smith's claim.

BRITTON, J.—I concur.

FALCONBRIDGE, C.J.—I agree with my brother Street, in this conclusion as to the application of the 60 days' rule and its result on the burthen of proof.

But, conceding this point to the appellants, I do not agree in holding the learned Judge in the Court below to have been wrong in his findings of fact. He had ample ground for saying that he did not believe the evidence put forward to support the pressure, and his judgment ought not to be reversed, because he has not said so in express terms.

In my opinion the appeal ought to be dismissed.

Appeal allowed with costs.

McEvoy & Perrin, London, solicitors for primary creditor.

Gibbons & Harper, London, solicitors for claimant and primary debtor.

WEEKLY COURT.

FEBRUARY, 22ND, 1902.

MARKS v. WATEROUS ENGINE WORKS CO.

Sale of Goods—Property not Passing—Breach of Warranty—Counterclaim for Balance of Purchase Money—Effect—Foreclosure of Property—Pleading.

McIntyre v. Crossley, [1895] A. C. 463, followed.

Motion by the defendants to vary the minutes of judgment pronounced on April 15th, 1901, by limiting a time for the payment of the amount found due the defendants by

the plaintiff, and in default a foreclosure of the plaintiff's right to the machine in question.

The action was brought for the cancellation of certain notes given by plaintiff to defendants upon the purchase by him of a 14 horse-power re-built Champion engine, for which plaintiff gave in addition to the notes an old 12 horse-power engine, or in the alternative for damages for breach of warranty as to the power of the engine, and for the price of the old engine. The defendants counterclaimed for the unpaid purchase money represented by the notes, alleging a conditional sale of the engine, and that the property had not passed, and therefore the action for breach of warranty would not lie. The learned Judge (STREET, J.) held that the plaintiff having kept the engine for two seasons must be deemed to have accepted it, and that the counterclaim removed any difficulty as to the claim for breach of warranty, for in answer to such a counterclaim the plaintiff was entitled to plead a breach of warranty.

J. H. Moss, for defendants.

W. E. Middleton, for plaintiff, relied on *McIntyre v. Crossley*, [1895] A. C. 463, as shewing that the title to the machine had become vested in him.

STREET, J.—Held, that the judgment as settled by the registrar was the only judgment which should be entered in the present action, and the expression of opinion as to the ownership contained in the written reasons for judgment should not be embodied in it, as the question of ownership was not properly before the Judge.

Motion dismissed with costs.

Blewett & Bray, Listowel, solicitors for plaintiff.

Wilkes & Henderson, Brantford, solicitors for defendants.

WINCHESTER,
Master.

FEBRUARY 18TH, 1902.

CHAMBERS.

CUMMINGS & CO. v. RYAN.

Parties—Action by Person Using his own Name with the Addition of the Words "& Co."—Should Sue in his own Name only—Rules 143, 144, and 222.

An application by the defendants for an order staying proceedings herein upon the ground that the plaintiffs have failed to comply with the demand made by the defendants for a declaration in writing of the names and places of residence of all persons constituting the plaintiff firm.

Frank Denton, K.C., for defendants.

R. S. Neville, for plaintiff.

THE MASTER IN CHAMBERS:—The demand was served under and by virtue of Rule 144, on the 10th February inst. No answer was made to that demand until the 14th inst., when the plaintiff's solicitor gave the information to defendants' solicitor in the office of a special examiner; at the same hour the plaintiff's solicitor was served with notice of motion for the order herein, such service being made at his office.

Counsel for defendants asked on the return that no order other than that the costs of the application be costs in the clause, be made.

Counsel for plaintiff objected and asked that the costs of the application be paid by the defendants to the plaintiff, on the ground that Rule 144 does not apply where there is only one party plaintiff.

It is quite true that if the style of the cause only shewed one party as plaintiff, then not only the motion, but the demand, would not have been served under Rule 144; the procedure would have been in that case under Rule 143.

The difficulty has arisen through the plaintiffs using a firm name in bringing the action, while he is sole member of the firm. This is opposed to the provisions of Rule 222—see the able article written upon this point by Mr. Alexander MacGregor, and published in 37 C. L. J. at p. 763. The plaintiff, having been the cause of the difficulty, might very well have been asked to pay the costs occasioned by his improperly using the name of the firm instead of his own name.

The order will go as asked by defendants' counsel. No costs of plaintiff's affidavits.

R. S. Neville, Toronto, solicitor for plaintiff.

Denton, Dunn, & Boulton, Toronto, solicitors for defendants.

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No. 8.

FERGUSON, J.

FEBRUARY 24TH, 1902.

TRIAL.

HULL v. ALLEN.

Evidence—Parol Evidence to Establish Trust—Admission of.

This was an action for an account of defendant's dealings with certain properties transferred to him by plaintiff as security for an indorsement, and for other relief.

The plaintiff, among other things, asked for a declaration that the purchase made by the defendant of a lot of land, known as "the Merrill lot," was made by him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust.

W. Nesbitt, K.C., and A. S. Ball, Woodstock, for the plaintiff.

J. P. Mabey, K.C., for the defendant.

FERGUSON, J., *held*, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust.

The authorities are conflicting. *Bartlett v. Pickersgill*, 1 Cox 15, 1 Eden 515, 4 East 577, *Heard v. Piley*, L. R. 4 Ch. 548, *James v. Smith*, [1891] 1 Ch. at p. 387, and *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, discussed.

Held, however, that the evidence in this case failed to prove the trust.

As to the claim for damages for the defendant's failure to "bid in" the farm known as "the Hoffman farm," at the sale thereof under the power in a mortgage, in violation

of his alleged promise so to do, the burden of proof was on the plaintiff, and he had failed to sustain it.

Judgment for the plaintiff, for an account except as to the Merrill lot and the Hoffman farm. Reference to Master at Woodstock. Further directions and costs reserved till after report.

A. S. Ball, Woodstock, solicitor for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

STREET, J.

FEBRUARY 24TH, 1902.

WEEKLY COURT.

RE BRADBURN AND TURNER.

Vendor and Purchaser—Will—Charge of Debts—But Estate Charged not Vested—R. S. O. ch. 129, sec. 18—Executors can Make Title—Devisees of Residue After Payment of Debts need not be Parties to Conveyance—Widow—Dower—Election—Purchaser Entitled to a Release of, from Widow, or Declaration, so as to Estop her.

Petition under the Vendors' and Purchasers' Act.

A. P. Poussette, K.C., for vendors.

E. A. Peck, Peterborough, for purchaser.

STREET, J.—The testator, Thomas Bradburn, by his will, dated 12th January, 1900, in the first place appointed his three sons, who were the vendors, to be his executors, directing them to pay all his lawful debts out of his estate. Then followed devises and bequests of real and personal property to various members of his family. These were followed by a clause declaring that all the foregoing property was to be free and clear of every incumbrance whatsoever. The next clause was as follows:—"I do hereby will the following property, subject to the payment of all my just debts; and when all my debts are fully paid, the balance shall be divided amongst my said four children, Thomas, William, Rupert, and Mabel, share and share alike. The property which I will to my children, share and share alike, is situated as follows." Then came a list of the lands referred to in this clause covering the land which was the subject of the petition. Then the will proceeded:—"I would here suggest what I consider the best means of protection for all parties interested in this my will, to make no division of any of my property, but pool it altogether and divide the proceeds share and share alike. . .

The property willed and described herein is intended to go to the parties direct."

The case comes within the provisions of sec. 18 of R. S. O. ch. 129, under which, when a charge for debts is created, but the estate is not vested in any trustee or trustees by the terms of the will, a power of sale is given to the executors, and purchasers are (by sec. 19) relieved from the necessity of inquiring as to the due execution of the power. Therefore, the executors can make title to these lands without the concurrence of any of the devisees. The children's rights are given to them only in the residue after payment of the debts, and the later references in the will must be read accordingly.

The will contains various gifts to the widow, including an annuity of \$1,500, payable quarterly, and declares that she is to accept them in lieu of dower. The petition states that after the death of the testator, the widow elected to, and did, accept the provision made for her in lieu of dower, and has since received annually the annuity. I think the purchaser is entitled either to a release from her or to a declaration from her in a form sufficient to estop her as against him from claiming dower, for her receipt of the annuity was only *prima facie* evidence against her, and she might, in spite of it, be let in to claim her dower in case it should appear that she had elected without proper knowledge of the effect of her so doing.

Order declaring accordingly. No costs.

Poussette & McWilliams, Peterborough, solicitors for vendor.

Dennistoun, Peck, & Stevenson, Peterborough, solicitors for purchaser.

LOUNT, J.

FEBRUARY 24TH, 1902.

CHAMBERS.

RE DUNCOMBE.

Life Insurance—Preferred Beneficiary—Will—Bequest of Half of Estate, Including Policies—Construction of—Trust.

Application by executors under Rule 938 for construction of clause 5 of will of Thomas Wallace Duncombe, who died, without issue, on the 2nd October, 1901, leaving him

surviving Mary Duncombe, his widow. Three policies of insurance upon the life of the testator are in question: one for \$1,000, payable to his wife at his death; one for \$5,000, for the benefit of his wife, the beneficiary, providing, however, that at his death an annuity of \$250 per year for twenty years should be paid to his wife, the beneficiary; and one for \$1,000, payable at his death to his legal heirs. Clause 5 of the will is as follows:—"I give and bequeath unto my dear wife, Mary Duncombe, my household furniture and one-half of my estate, including the policies of insurance made payable to her upon my death."

W. A. Wilson, St. Thomas, for the executors.

J. M. Clark, K.C., for Mary Duncombe.

J. R. Cartwright, K.C., for the Attorney-General.

A. M. Stewart, for the official guardian.

M. F. Muir, Brantford, for Mrs. Chapin.

LOUNT, J.—*Held*, that the moneys accruing under the third policy form part of the estate, but, as to the first two policies, a trust was created in favour of the wife, a preferred beneficiary, and the trust remained in her favour up to his death, and the moneys payable under these policies formed no part of his estate. Order declaring accordingly. Costs of all parties out of the estate.

MACMAHON, J.

FEBRUARY 25TH, 1902.

TRIAL.

OTTAWA ELECTRIC CO. v. CONSUMERS ELECTRIC CO.

Company—Supplying Electric Light, &c.—Not Entitled to Sole Use of Streets—Other Companies Using Streets Must Keep Primary Wires at a Distance of 3 Feet from Secondary Wires—Between two Secondary Wires a Distance of 6 to 9 Inches must be Kept—Injunction—Apprehended Danger—Ground for Moving.

Action tried at Ottawa, brought to restrain defendants from erecting or maintaining poles or wires on certain streets in the city of Ottawa, Ontario, in such proximity to those of plaintiffs as to interfere with the proper working of their system, or to constitute menace and danger to the plaintiffs, or to their employees, or to the general public.

The plaintiff company is a consolidation of other companies under 57 & 58 Vict. ch. 111 (D.) The defendant

company obtained a charter in October, 1901, under R. S. C. ch. 119. The plaintiffs, for many years, have sold and distributed electricity for purposes of light, heat, and power in Ottawa, and have erected poles and wires along certain streets, subject to the terms and conditions of by-laws of the corporation of Ottawa.

The defendant company is authorized to erect and maintain poles and wires for the like purposes as the plaintiff company.

G. F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for plaintiffs.

W. Nesbitt, K.C., and Glyn Osler, Ottawa, for defendants.

MACMAHON, J.—In dealing with the case it must not be overlooked that the litigants are both electric light companies, and, therefore, on an equal footing in regard to the business they were respectively chartered to carry on, and the plaintiffs being in prior occupation of the streets gives them no exclusive right or privilege to the use of such streets or to the particular sides of the said streets occupied by their poles and wires. But, being first in occupation and using the streets under an authority conferred by the municipality, they are entitled to protection against a company subsequently using the streets, under a like authority, in such a manner as is likely to injure the property of the plaintiffs, or endanger their workmen or servants: *Bell Telephone v. Belleville E. L. Co.*, 12 O. R. 571; *Consol. Elec. Light Co. v. People's Elec. L. Co.*, 94 Ala. 372; *Rutland, etc., Co. v. Marble City, etc., Co.*, 65 Vt. 377. . . . There was considerable divergence in the evidence given by those skilled in the practical working of electric light and other electrical plants, as to the distance within which the poles and wires of one electric light system might with safety be placed to that of another electric light company. . . . Notwithstanding the immunity from accidents which it is said may exist for a time where the poles of one electric company are erected and pass between the wires of another company, there is beyond question an element of great danger in construction, depending in some measure on climatic changes, the danger being much greater where, as in the section of the Province in which these companies are chartered to carry on business, there are frequent sleet and snow storms. Upon the evidence, three feet may be regarded as a distance of safety between primary and secondary wires, but as between two secondary wires they may parallel each other at a distance of from 6 to 9 inches without the slightest danger.

. . . Apprehended danger was a sufficient ground for moving for the interim injunction: *Siddons v. Short*, 2 C. P. D. 572; *Western Union, etc., Co. v. Guernsey, etc., Co.*, 46 Mo. App. 120. Costs of action and motion for injunction to plaintiffs.

MacCraken, Henderson, & McDougal, Ottawa, solicitors for plaintiffs.

O'Gara, Wyld, & Osler, Ottawa, solicitors for defendants.

STREET, J.

FEBRUARY 25TH, 1902.

CHAMBERS.

HUME v. HUME.

Pleading — Counterclaim — Action by Executrix and Devisees for Arrears of Annuity—Counterclaim by Co-Executor for Moneys Received for Estate—Rule 248.

Pender v. Taddei, [1898] 1 Q. B. 708, followed.

Appeal by defendant from order of Master in Chambers, striking out counterclaim. The action was brought by the widow of George Hume for arrears of an annuity under his will. The counterclaim was for moneys which the defendant alleged came to the hands of plaintiff, as one of the executors of the will, and which she had not accounted for. The Master held that this was not a proper subject of counterclaim, it being a claim against the plaintiff in a representative character.

J. Bicknell, for appellant.

N. F. Paterson, K.C., for plaintiff.

STREET, J.—*Held*, that since the counterclaim was for relief, not by defendant alone, but by defendant for himself and others, it does not come within Rule 248. *Pender v. Taddei*, [1898] 1 Q. B. 798, followed. Held, also, that the question as to the effect of the release executed by plaintiff of part of the moneys claimed in the action is not a matter to be raised by counterclaim, but as a defence *pro tanto* to plaintiff's claim. Appeal dismissed with costs payable forthwith.

Paterson, Ritchie, & Sweeney, Toronto, solicitors for plaintiff.

J. W. Elliott, Milton, solicitor for defendant.

STREET, J.

FEBRUARY 25TH, 1902.

CHAMBERS.

RE GARDNER.

Will — Construction — Distribution of Estate — "Heirs" — "Next in Heirship" — Period of Ascertainment.

Motion for order declaring the construction of the will of Robert Gardner, deceased.

The will was dated 18th October, 1870; the testator died 25th November, 1870; and the widow died 31st December, 1901.

The clause of the will in question followed a gift to the widow of the real and personal estate for her life, and was as follows:—"I will and bequeath that my whole estate (after the death of my wife . . .) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Watkins, and my deceased sister Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship."

A. McKechnie, Brampton, for executor.

F. W. Harcourt, for infants.

J. A. Wright, J. H. Moss, and R. E. Heggie, Brampton, for adults interested.

STREET, J.—The persons entitled in the first place are all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death, or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The testator intends that if any one of those entitled should die in the lifetime of his widow, the share should go to the issue of the one dying. It is necessary, therefore, to construe the words "children or their heirs" as meaning "children or their issue," and as giving the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The result is that the shares of the children entitled to share become vested at once; but in the event of any child dying in the lifetime of the widow leaving issue, the share of that child is divested, and goes to such issue, and vests at once and finally in the issue, who then become the stock of descent. The words "should no heirs of the above be alive, that it go to the next in heirship," have served their purpose

when they have indicated the meaning intended by the testator to be given to the word "heirs" in the preceding sentence. That word is to be construed to mean "issue;" so is the word "heirs" in the sentence "should no heirs:" but the words "next in heirship" are to be construed as meaning the heirs at law to the realty and the statutory next of kin to the personalty: *Keay v. Boulton*, 25 Ch. D. 213. The heirs or next of kin in each case are to be ascertained at the death of the person whose vested share they take.

FEBRUARY 26TH, 1902.

DIVISIONAL COURT.

EVANS v. JAFFRAY.

Discovery—Affidavit of Documents—Materiality of Documents—Examination of Parties—Scope of—Consequential Discovery—Discretion—Contents of Documents—Recollection—Costs of Lengthy Examination.

An appeal by the plaintiff from the order of MEREDITH, C. J., *ante* 29.

The plaintiff alleged a contract of partnership between him and the defendant J., for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy.

It appeared from the examination for discovery of the defendant R., that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid \$20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that

he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid.

F. A. Anglin, for the plaintiff.

E. F. B. Johnston, K.C., and C. W. Kerr, for the defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) was delivered by STREET, J., holding as follows:—

(1) That the agreements and the cheque and also a certain memorandum prepared by the defendant R., were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

(2) That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages.

(3) That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J.; whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid.

(4) That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

(5) That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them.

Stuart v. Bute, 11 Sim. 452, 12 Sim. 461; Taylor v. Rundell, 11 Sim. 391, 1 Cr. & Ph. 104, and Dalrymple v. Leslie, 8 Q. B. D. 5, followed.

Semle, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of MEREDITH, C.J., *ante* 29, varied.

FALCONBRIDGE, C.J.

FEBRUARY 27TH, 1902.

WEEKLY COURT.

PADGET v. PADGET.

*Practice—Appearance—Limited Appearance—Submission to Judgment
—Irregularity—Motion for Judgment.*

Motion (heard at Ottawa) by plaintiff to set aside, as irregular, the appearance entered by defendant, or for leave to sign judgment for the declaration asked for in the indorsement on the writ of summons, with costs, and to proceed with the plaintiff's claim for damages, as indorsed on the writ, or to discontinue the action as to the claim for damages, without costs. The indorsement on the writ was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of John Padget, but erroneously described therein, were absolutely freed and discharged from the conditions and obligations to which they are subjected by the will in favour of the defendant, and absolutely freed and discharged from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant; and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands, when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows:—"Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will. . . ."

W. A. D. Lees, Ottawa, for plaintiff.

J. I. MacCraken, Ottawa, for defendant.

FALCONBRIDGE, C.J.—There is no authority whatever in the Rules or in the practice for an appearance limited as is this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance will, therefore, be set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. The defendant may have leave to file a proper appearance on payment of costs of this motion. But the motion was really

argued before me as a motion for judgment, and the merits were gone into, and if the defendant so elects within one week, my order will be that, on execution by him of the quit-claim and on payment of costs (which I fix at \$10), this action shall be discontinued.

Lees & Hall, Ottawa, solicitors for plaintiff.

MacCraken, Henderson, & McDougal, solicitors for defendant.

FALCONBRIDGE, C.J.]

[MARCH 1ST, 1902.

WEEKLY COURT.

RE PRESCOTT ELEVATOR CO.

Company — Winding-up — Terms of Order — Execution Creditor — Priorities.

Motion for a winding-up order under the Dominion Winding-up Act, heard in the Ottawa Weekly Court.

J. I. MacCraken, Ottawa, for the petitioners.

F. A. Magee, Ottawa, for Dunn, an execution creditor of the company.

FALCONBRIDGE, C.J.—(1) There will be a declaration that this company is a corporation to which the provisions of the Winding-up Act and amendments are applicable. (2) Declaration that the company be wound up under the provisions of the said Act and amendments; and an order directing the winding-up of the same under said provisions. (3) Order appointing the Ottawa Trust and Deposit Company, Limited, provisional liquidator. (4) Order referring it to the Master at Ottawa to appoint a permanent liquidator, and to wind up the company. (5) Usual order as to costs. (6) It was stated that the judgment creditor Dunn has an execution in the sheriff's hands. It is not the intention of this order that the fruits of his diligence should be taken away from him, if he has placed himself in any position of priority. If he has done so, the Master shall direct the liquidator to sell such chattels as may be found exigible for the benefit of the execution creditor.

CORRECTION.

In *Bartlett v. Canadian Bank of Commerce*, *ante* 68, the decision of the Court was based upon the opinion that sufficient discovery had already been afforded to the plaintiffs. The Chief Justice of the King's Bench, delivering the judgment of the Divisional Court, expressed approval of the case of *Ontario Bank v. Shields*, 33 C. L. J. 393, but the question whether a bank teller is an officer of the bank was not actually decided.

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[MARCH 4TH, 1902.]

DIVISIONAL COURT.

BIRKBECK LOAN CO. v. JOHNSTON.

*Building Society—Shares—Advance on—Trust—Notice—Mortgages—
Consolidation—Evidence—Examination for Discovery.*

The plaintiffs are a building society incorporated under R. S. O. 1887 ch. 169. The defendant Mrs. Amelia Johnston was on the 20th July, 1897, the holder of the following stock in the society:—

- 6 shares permanent stock A., in her own name.
- 4 shares instalment stock C., "in trust."
- 1 share instalment stock C., "in trust for Miss Amelia Johnston."
- 1 share instalment stock C., "in trust for Miss Marjorie Johnston."

Some shares of instalment stock B., of little value.

On the 20th July, 1897, Mrs. Johnston executed a transfer to the plaintiffs' treasurer, as security for an advance of \$700 then made to her, of the following: "All my stock in the said company, consisting of shares of classes A., B., and C. stocks held by me in the said company." On the 1st October, 1897, she obtained a further advance of \$600 from the company, and transferred to the treasurer as security "six shares of class C. instalment stock." It was admitted that the six shares intended to be transferred were the same six shares as those standing in her name as trustee as above mentioned. As further security for this advance, she executed on the same day a mortgage to the company upon lands in Strathroy and Toronto, in which it was recited that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance to her \$600 upon such shares, with the mortgage as further security.

Afterwards, the defendant Frank K. Johnston bought from his mother, the defendant Mrs. Amelia Johnston, the Strathroy property, assuming the mortgage for \$600 and paying some money in upon the six shares of C. stock.

Afterwards, the defendant Anna K. Johnston bought from Frank the Strathroy property, and, from the assignee of her mother, Amelia, the Toronto property, both subject to the mortgage for \$600, which she assumed. Finally, in July, 1901, the defendant Anna K. Johnston purchased from her mother, Amelia, her supposed equity in the six shares of C. stock, subject to the \$600 mortgage.

This action was brought against Mrs. Amelia Johnston, Frank K. Johnston, and Anna K. Johnston, to recover the amount of both mortgages, and, in default of payment, for foreclosure of the interest of the defendants in the stock.

The defendant Amelia delivered no defence; the defendants Anna and Frank admitted the making of the mortgage of the 1st October, 1897, and the transfer of six shares of C. stock to the plaintiffs, but put the plaintiffs to the proof of the mortgage of July, 1897; they brought into Court the arrears upon the mortgage of October, and the plaintiffs accepted the amount in satisfaction of such arrears.

The defendant Amelia was examined by the plaintiffs for discovery, and parts of her examination were read by the plaintiffs at the trial, the other defendants objecting that the examination was not evidence against them.

The trial Judge gave judgment in favour of the plaintiffs, and the defendant Anna appealed.

P. H. Bartlett, London, for the appellant.

T. H. Luscombe, London, for the plaintiffs.

The judgment of the Court (STREET and BRITTON, JJ.) was delivered by

STREET, J.:—The defendant Amelia Johnston held all the six shares in trust for her children: as to two shares, the trust is declared on the face of the certificates; as to the other four, the words "in trust" are sufficient to put a person dealing with her upon inquiry, and her evidence (put in by the plaintiffs) shews that they were held in trust for her children. . . . The company are affected with notice that she was not the owner of the shares and had no power to mortgage them, just as any other person advancing money upon the shares would have been. . . . There is no evidence of any authority to her to deal with the property, and she had no more right, as far as appears, to mortgage these shares than if they had stood in the names of her children, instead of in her name in trust for them. . . . Section 53 of the R. S. O. ch. 205 relieves the company from the duty of seeing to the execution of any trust to which any shares are subject, and enables the company to pay money to a shareholder who holds shares upon any trust, without seeing that the money is properly dealt

with by the shareholder after receiving it; but it does not entitle the company to lend money to A. with express notice that he is a mere trustee for B.: *Bank of Montreal v. Sweeny*, 12 App. Cas. 617; *Simpson v. Molsons Bank*, [1895] A. C. 270; *London and Canadian L. & H. Co. v. Duggan*, [1893] A. C. 506; *Great Eastern R. W. Co. v. Turner*, L. R. 8 Ch. 149.

The only shares which passed by the mortgage of July, 1897, were the six shares of class A.

The company cannot consolidate their two mortgages against the defendant Anna K. Johnston, in whom the equity of redemption in the land mortgaged is vested; because they have not shewn any notice to her, at the time she acquired the equity, that any other mortgage existed in the hands of the company: *Stark v. Reid*, 26 O. R. 257.

[The examination for discovery of Amelia Johnston is not evidence against Anna K. Johnston.

Appeal allowed.

[MARCH 3RD, 1902.

DIVISIONAL COURT.

HEFFERNAN v. McNAB.

Will—Construction—Bequest of Interest on Payments to be made by Devisees of Land—Sale of Land by Testator after making his will—Failure of Bequest.

Appeal by plaintiff from judgment of MACMAHON, J., in action by a legatee under the will of Michael McNab, deceased, for its construction, and to set aside a release of his claims thereunder. The testator devised a farm to each of his sons John and Albert, charged with the payment \$2,000 and \$1,000 respectively. Subsequently he sold both the farms to John, and took back a mortgage for \$5,000, with interest at 4 per cent. per annum. The 9th clause of the will was as follows: "I hereby authorize my said executors to purchase and erect a fit and proper tombstone over my grave, and I hereby will that my executors do pay over to my beloved nephew, Edward Heffernan, the interest accruing from the payments to be made by John, James, and Albert McNab, yearly, until the last payment is made by them to my executors, and not before then will my executors furnish them with good and sufficient deeds." At the time of the death of the testator, Albert was also indebted to him. The trial Judge held that the plaintiff, the nephew, took nothing, and was bound by the release he gave.

J. R. Roaf and W. T. J. Lee, for plaintiff.

E. F. B. Johnston, K.C., and J. D. Falconbridge, for defendants.

The judgment of the Court (FERGUSON and MEREDITH, JJ.) was delivered by

MEREDITH, J.—From whichever point of view this bequest is looked at, it fails. The gift is of a specific nature—the interest on certain payments. It is not a gift of money charged upon or to be paid out of any particular property. The thing itself is given with particular interest.

Then if the case is to be looked at as matters stood when the will was made, the gift fails. It could then have had reference only to the payments which the testator's sons John and Albert were to have made, under the will in respect of the lands by it devised to them. These devises were revoked by the sale of the lands, and there are no payments to be made by the sons under any provision of the will. This is admitted, but it is contended that the circumstances existing at the time of the making of the will are to be ignored altogether, and the will is to be read as giving the plaintiff the interest upon any indebtedness from John and Albert existing at the time of the testator's death, and, as John then owed the purchase money of the lands, and Albert was indebted to him also for some arrears of rent, these are to be taken to be the specific payments the interest upon which the plaintiff was to have; but that contention fails upon the proper interpretation of the will. How can the words used be applicable to some arrears of rent? How can such arrears be looked upon as the payments to be made by them and in respect of which they are to be furnished with good and sufficient deeds?

Earlier provisions made in the will shew beyond reasonable question what are the payments the interest upon which the plaintiff was to be paid. And, in the face of these provisions, it is not fairly open to argument that the gift to the plaintiff was of anything other than the interest upon these payments. . . . The learned trial Judge seems to have fallen into an error in regard to the annual payments of \$150.

The gift to the plaintiff fails because the thing which was given never came into existence. The lands devised to John and Albert were sold and conveyed by the testator to John, and so no payments are, or ever were, to be really made under the will by them.

It is not necessary to consider the question of the validity of the release given by the plaintiff.

Appeal dismissed with costs.

Cameron & Lee, Toronto, solicitors for plaintiff.

Cowan & McNab, Walkerton, solicitors for defendants.

[MARCH 3RD, 1902.]

DIVISIONAL COURT.

GILDNER v. BUSSE.

Defamation—Privileged Occasion—Malice.

Somerville v. Hawkins, 10 C. B. 583, Taylor v. Hawkins, 16 Q. B. 308, and Toogood v. Spyring, 1 C. M. & R. 181, per Parke, B., at p. 193, approved.

Motion by defendant to set aside verdict and judgment for plaintiff in action for slander tried before BOYD, C., and a jury, and for a new trial. The plaintiff was employed by defendant as a sausage maker, and when discharging plaintiff from his employment, defendant in presence of two other employees called plaintiff a thief. Subsequently plaintiff called for his wages, and defendant again called him a thief, and refused to pay him his wages. The jury found a verdict for plaintiff for \$100 damages.

W. J. O'Neail, for defendant.

J. M. Godfrey, for plaintiff.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.:—The jury were told in effect "if you believe the defendant and his witnesses you will measure the damages by the very smallest you can find, but, if you believe the plaintiff and his witnesses you would give him good round damages, not however up to \$2,000 nor anything near it."

Nor were the jury warned that they were not to give damages for the slander given in evidence, but not sued for in this action.

They ought to have been so warned, and, if the observations as to the amount of damages were intended as binding upon them, and not merely as suggestions as to what they might or probably would do, they encroached upon the province of the jury.

But the most serious objection to the course of the trial is in the ruling, and charge to the jury, that neither of the occasions of the publication of the alleged slanders was privileged. They were both privileged.

The ground of the ruling as to the first occasion seems to have been that other servants were called in or present; that cannot destroy privilege, especially in such a case as this, where they are more or less distinctly concerned in the matter. This is abundantly clear: see Somerville v. Hawkins, 10 C. B. 583, and Taylor v. Hawkins, 16 Q. B. 308. . . It is said that on the second occasion a stranger, a mere

bystander, was within hearing. That does not necessarily remove the privilege, or prove malice. It depends upon the circumstances of the case: *Toogood v. Spyring*, 1 C. M. & R. 181, per Parke, B., whose language is very applicable to the facts of this case. See also *Hunt v. G. A. R. Co.*, [1891] 2 Q. B. 189; *Pittard v. Oliver*, [1891] 1 Q. B. 474; *Tincer v. G. W. R. Co.*, 33 U. C. R. 8; and *Milcar v. Johnston*, 23 C. P. 580. . . .

The second occasion was privileged; the plaintiff had himself to blame for raising a disputation in the presence of the stranger; and if there was no evidence of actual malice, the plaintiff should have been nonsuited.

But, upon the whole case, there was, I think, enough evidence to entitle the plaintiff to go to the jury upon that question; the onus of proof of which was of course upon him.

It is well to say as little as possible that might in any way affect that question at a future trial; and it is enough for the purposes of this motion to refer to the contradictory character of the testimony at the trial upon almost every material fact, and call for the intervention of a jury to determine where the truth lay, and whether defendant acted in good faith or maliciously in accusing the plaintiff of theft.

New trial directed. Costs of former trial and this motion to be in the action to the defendant only.

R. C. LeVesconte, Toronto, solicitor for plaintiff.

Robinette & Godfrey, Toronto, solicitors for defendant.

[MARCH 3RD, 1902.]

DIVISIONAL COURT.

BALL v. FARMERS' CENTRAL MUTUAL FIRE INS. CO.

Fire Insurance — Application — Diagram of Buildings — Drawn by Applicant at Request of Insurers — Omission of Saw-mill from — Effect of — Agent.

Appeal by plaintiff from judgment of junior Judge of County Court of Middlesex in action by plaintiff, a clergyman, to recover \$200 under a policy issued to him by defendants on his dwelling-house, which was destroyed by fire, and was situate on Mill street, in the village of Lion's Head. The defendants alleged that in his application and in the diagram of the premises made by him, plaintiff omitted to mention or shew a saw-mill situated 90 feet from his house; that they are prohibited by their by-laws from insuring any building within 150 feet of a saw-mill; and that the application disclosed this fact, and required that plaintiff must

shew, by it and the diagram, all buildings, and their kind, situate within that distance; and that therefore there had been a breach of a statutory condition, and the policy was void.

G. C. Gibbons, K.C., for plaintiff.

George H. Kilmer, for defendants.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.:—If it were the duty of the plaintiff to have shewn that building upon the diagram, he cannot succeed. There is nothing, however, in any of the questions he was required to answer, directly or indirectly bearing upon the point; nothing to direct his attention to any requirements of the company respecting it. He acted in good faith, and did not know of such requirements, having read only what was printed upon the face of the application. Nor is there anything anywhere upon the application to indicate that it is the applicant's duty to prepare the diagram. It is upon that side of the application reserved for the certification and the answers of the company's officers, and the correctness of the diagram is to be certified to by their surveyor, and he is also to certify, among other things, to some personal examination of the property. So far there is nothing required from the assured in connection with the diagram. But in his application he has signed a declaration that his answers to the questions and the description of the annexed diagram are true and complete in all particulars. The word "annexed" is not an apt one to indicate "upon the other side." And the diagram was drawn by him, but it was drawn upon the written request of the defendants' agent to "please draw a diagram of the premises." There is no objection to the diagram, as one of the premises only. It is objected to for not shewing buildings not on the premises. In other words, it is contended that the applicant should have furnished a diagram giving all the information mentioned in the printed directions on the back of the application under the word "diagram." But that was nowhere required of him, and he had no knowledge of it. On the contrary, he was asked to give a diagram of the premises, and that he did. The only shadow of ground for this contention is the declaration of the truth and completeness of his answers and the description in the diagram. But there is no declaration that the diagram is drawn in accordance with such directions, or that it gives the information therein mentioned. Before the company can justly avoid a policy after loss upon such grounds, in such a case

as this, they must at least have a declaration from the applicant that the diagram supplies the information specified in the printed directions, or otherwise obtain a representation from him respecting the matters there mentioned: see *Bauer v. Canada Life Assurance Co.*, decided by the Court of Appeal, not reported. As it cannot rightly be said that the plaintiff in any manner represented that there were no other buildings within 150 feet of the risk, nor that there was any concealment of the fact that there were, how can the policy be avoided?

It is abundantly clear on the evidence that Miller, who took the application, was the defendants' agent.

Appeal allowed with costs. Judgment below set aside and judgment to be entered for plaintiff for amount of loss with costs of action.

Gibbons & Harper, London, solicitors for plaintiff.

David Robertson, Walkerton, solicitor for defendants.

MARCH 4TH, 1902.

DIVISIONAL COURT.

ROSE v. CRODEN.

*Pleading—Statement of Claim—Amendment—Election—Penalty—
Writ of Summons—Discovery.*

Where the plaintiff indorsed his writ for penalties under the Dominion Elections Act, 1900, and by his statement of claim asked damages at common law, and thereafter examined defendant for discovery:—

Held, that plaintiff could not afterwards amend, and claim the penalty under the statute.

Held, also, that the provisions of sec. 134 of the Elections Act must be taken as substituted, in actions brought under it, for the general provisions of the Canada Evidence Act.

. *Reg. v. Fox*, 18 P. R. 343, distinguished.

Appeal by plaintiff from order of FERGUSON, J., at the trial, dismissing motion by plaintiff for an order to amend the statement of claim by adding to the 5th paragraph the words, "and the defendant acted contrary to the Dominion Elections Act, 1900, and is indebted to the plaintiff in the sum of \$1,000." The claim, as indorsed upon the writ of summons, was as follows: "\$600 for penalties under the Dominion Elections Act, 1900, from the defendant, being moneys forfeited by the defendant by reason of wilful misfeasance, act, or omission on his part in violation of said Act, and also refusing and neglecting to perform obligations and formalities required of him by said Act. The plaintiff also

claims \$600 damages from the defendant for wrongfully depriving plaintiff of the right to vote at the election held on the 7th day of November, 1900, of a member to serve in the House of Commons of Canada for the electoral district of the city of London." The writ was issued on the 30th January, 1901. The statement of claim (delivered 12th March, 1901) set out that the defendant acted as a deputy returning officer at the election mentioned; that the plaintiff was entitled to vote at the polling-place where the defendant was in charge; (5) that the defendant falsely and maliciously refused to allow the plaintiff to vote; and the plaintiff claimed \$1,000 and costs of action. The motion for leave to amend was not made until the 31st December, 1901, just a week before the trial, and was referred to the trial Judge, who heard it on the 7th January, and dismissed it, upon the ground that the plaintiff should not be allowed to amend so as to sue for a statutory penalty, after he had elected, by his statement of claim and by examining for discovery, to proceed at common law.

N. W. Rowell, for plaintiff.

G. C. Gibbons, K.C., for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by—

STREET, J.:—The plaintiff having two remedies open to him, one his common law action for damages, and the other his statutory action under the 19th, 131st, and 133rd sections of the Dominion Elections Act, 1900, appears to have issued his writ claiming the penalties, but to have altered the frame of his action when he came to deliver his statement of claim, and to have then claimed only at common law; for the distinguishing characteristics of the action for penalties pointed out by the 131st section of the Act are not to be found in his pleading. It appears to be necessary to preserve in some way a clear line between the two classes of action, because of the plaintiff's right in the statutory action to have the defendant committed to prison in case of nonpayment of the amount of the penalties for which judgment is given, as well as on account of the limit of time allowed for bringing that action, and for other reasons.

The defendant, treating this as a common law action, submitted to discovery in it without objection. The question whether the defendant might have successfully resisted discovery in case the action had been brought for the penalties given by sec. 19 does not seem to me to be covered by the decision in *Reg. v. Fox*, 18 P. R. 343, by reason of the special provisions of sec. 134, which must, I think, be taken to be substituted in actions brought under the Elections Act for

the general provisions of the Canada Evidence Act upon which that case turned.

This section 134 seems to introduce into actions for penalties under the Act the same exceptions to the general rules regarding discovery as exist in ordinary civil actions, under the laws of the Province. One of those rules undoubtedly is that discovery will not be compelled from a defendant in an action to recover penalties: *Martin v. Treacher*, 16 Q. B. D. 507; *Saunders v. Wiel*, [1892] 2 Q. B. 321; *Mexborough v. Whitwood*, [1897] 2 Q. B. 111.

The decision of *Reg. v. Fox*, 18 P. R. 343, turned upon a provision in the Canada Evidence Act which was held to govern the case, and not upon the general provincial law of evidence; it does not therefore establish a rule generally applicable to civil suits in this Province.

I think, therefore, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery; in an ordinary common law action he was of course bound to submit to examination, and he did so.

Having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, he then applied to amend his statement of claim by turning his action into one for penalties. At the time he made the application, more than a year had expired since the act complained of was committed, and he could not have brought a new action for the penalties: see sec. 142 of the Act.

I think, under these circumstances, that, notwithstanding the indorsement upon his writ, the plaintiff must be taken to have conclusively elected to pursue his common law remedy, and that the appeal should be dismissed with costs.

cf. B. Elliott, London, solicitor for plaintiff.

Gibbons & Harper, London, solicitors for defendant.

FERGUSON, J.

MARCH 4TH, 1902.

WEEKLY COURT.

FOX v. KLEIN.

Mortgage—To Two Different Mortgagees—Action for Sale by One Claiming Relief for Himself Only, Improper.

Davenport v. James, 7 Hare 252 n., followed.

Motion for leave to amend the pleadings in a mortgage action by striking out the name of one of the mortgagors, defendant James J. Mallon, deceased, who joined in the mortgage as administrator of John J. Shea, who died seized

of the property in question; and for judgment for sale. The defendant Klein became entitled as one of the heirs of Shea to a one-half interest, and on 30th May, 1892, made the mortgage in question for \$1,500; the plaintiff advancing, as stated in it, \$1,000, and one Ferry, the other \$500. Ferry assigned his interest to defendant Stock.

W. A. Skeans, for plaintiff.

A. E. Knox, for defendant Klein.

W. J. Tremcear, for defendant Stock, objected that the plaintiff should not have asked for relief as to his own claim of \$1,000 and interest and costs only, but have included the claim of defendant Stock; citing *Davenport v. James*, 7 Hare 252 *n*.

FERGUSON, J., allowed the name of James J. Mallon to be struck out, and directed the judgment to conform, as far as practicable, to the form of decree given in *Davenport v. James*, *supra*.

MARCH 5TH, 1902.

DIVISIONAL COURT.

MACNEE v. ROSE.

Infant—Liability to Indemnity—Next Friend—Improvident Litigation—\$400 Incurred to Enforce Doubtful Claim of Infant to \$200 Worth of Goods—Ratification after Majority must be in Writing—R. S. O. ch. 146, sec. 6.

Appeals by defendant Strawbridge, and plaintiff, from judgment of BOYD, C., dismissing claim of appellant Strawbridge against his co-defendant, J. H. Rose, for contribution and indemnity for and in respect of all costs, liabilities, and obligations incurred by the appellant in an action of Rose v. Winters, in which the appellant Strawbridge was the next friend of Rose, and co-plaintiff with him; and refusing to hold Rose liable to plaintiff for the costs incurred.

A. B. Aylesworth, K.C., for defendant Strawbridge.

J. B. Clarke, K.C., for plaintiff.

C. H. Widdifield, Picton, for defendant Rose.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by—

STREET, J.:—By the will Rose's father left his farm to his widow (now Winters), during the minority of his son, the defendant Rose, and to Rose absolutely when he became of age, and also gave her all the chattels on the farm, directing her to leave on it chattels to the value of those she received.

Shortly before defendant Rose came of age, Mr. and Mrs. Winters, who lived on the farm, advertised a sale of chattels.

They had a considerable quantity of their own, and advertised a sale of all. The defendant Strawbridge, the co-executor with Mrs. Winters under her husband's will, then commenced proceedings against Mr. and Mrs. Winters, to restrain a sale, and the costs in question were incurred. The action was dismissed with costs as against Mr. Winters, and it was held that the infant had no right to restrain the sale, and Mrs. Winters agreed, without admitting liability, to pay \$200 into Court, but eventually, instead, left the farm with \$200 worth of chattels, the conceded value of those she received, upon it.

The rule is that a next friend of an infant is entitled to indemnity from him if the proceedings taken are proper and undertaken with due care and prudence. I am not able to say that the Chancellor's view that Strawbridge was not entitled to indemnity is incorrect. Strawbridge incurred costs of \$400 to try and enforce a doubtful claim to goods worth \$200. This might not be conclusive if it were shewn that Strawbridge before doing so had taken obvious steps to avoid litigation. From what appears in evidence it seems highly probable that if he had gone to see Mrs. Winters, who lived in his neighbourhood, the action would have become unnecessary. To hold him entitled to charge these costs against the infant would be to offer a premium to rash and imprudent litigation. It is not shewn that the \$200 worth of goods could not have been preserved without incurring any costs at all. As to the claim against the infant, he is clearly protected by R. S. O. ch. 146, sec. 6, his ratification not being in writing. Appeals dismissed with costs.

P. Clark Macnee, Picton, plaintiff in person.

C. H. Widdifield, Picton, solicitor for defendant Rose.

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MARCH 5TH, 1902.

DIVISIONAL COURT.

CROWN CORUNDUM AND MICA CO. v. LOGAN.

*Action — Order Dismissing — Undertaking — Default in Giving—
Effect of.*

Decision of MEREDITH, C.J., in Chambers, *ante* 107, affirmed on appeal. (FALCONBRIDGE, C.J., STREET, J.)

W. E. Middleton, for plaintiffs.

G. F. Macdonnell, for defendant.

MARCH 3RD, 1902.

DIVISIONAL COURT.

HEAL v. SPRAMOTOR CO.

Contract—Breach—Subsequent Letter as to Contract—Satisfaction—Waiver—Evidence.

Evans v. Powis, 1 Ex. 601, and Edwards v. Hancher, 1 C. P. D. 111, followed.

Appeal by defendants from judgment of LOUNT, J., in favour of plaintiff for \$329.38 (less \$150 paid into Court), balance alleged to be due for goods sold by sample and delivered. The defendants counterclaimed for damages for delay in delivering a portion of the goods—certain printed catalogues—and alleged that they were not of the paper, weight, or quality agreed to be furnished, and brought \$150 into Court in full of plaintiffs' claim. The trial Judge held that the contract in writing between the parties, dated 25th February, 1901, was cancelled by an agreement embodied in a letter of 9th April, 1901, which he held had not in contemplation any claim for damages, and was a waiver in any event of any claim, and dismissed the counterclaim, rejecting any evidence outside the letter.

P. H. Bartlett, London, for plaintiffs.

George F. Shepley, K.C., for defendants.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.—The trial was too abruptly closed; the case should have been tried out in the usual way.

It may well be that, if there was no breach of the first agreement before the making of the second one, the defendants can have no claim now for breach of any term of the earlier agreement, unless also a breach of the later one.

But the defendants allege, and claim in respect of, breaches of the earlier agreement before the making of the later one; and the plaintiff denies such breaches, and alleges that, if there were any such, they were caused by the defendants' own default, and in any case were satisfied by the later agreement.

That agreement, however, does not purport to be in satisfaction or release any such claims; nor is it wholly inconsistent with such claims.

After breach there must be a release or accord and satisfaction.

There is no release; and the question of accord and satisfaction is one of fact, which must be determined upon all the relevant evidence which may be adduced at the trial. The latter agreement is evidence, and should have its due weight, but cannot exclude all other evidence.

A substituted promise may, if there be a good consideration, and if so intended by the parties, be a valid satisfaction of the breach of the prior promise. The question whether the parties so agreed is, in such a case as this, one for the jury, or for the trial Judge, if tried without the intervention of a jury; see *Evans v. Powis*, 1 Ex. 601; and *Edwards v. Hancher*, 1 C. P. D. 111.

There must be a new trial, unless the parties agree to a reference; and, as neither party sought the ruling in question, all costs should be costs in the action.

P. H. Bartlett, London, solicitor for plaintiffs.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for defendants.

[MARCH 3RD, 1902.]

DIVISIONAL COURT.

KEESO v. THOMPSON.

Work and Labour—Agent—Joint Liability—Guarantee—Damages for Unskilful Work—Set-off, not Counterclaim—Costs—Rule 1172.

Appeal by defendant Thompson from judgment of County Court of Perth for \$105 and costs in favour of plaintiff, and for appellant on his counterclaim for \$71.95 and costs, in action in that Court to recover \$165.40, balance alleged to be due to plaintiff for sawing, skidding, and piling 128,208 feet of lumber delivered by defendants at plaintiff's mill in the village of Listowel. The action was dismissed as against defendant Marshall on the ground that, to the knowledge of the plaintiff, he acted only as agent for his co-defendant. The appellant brought into Court \$90 as the balance due, alleging that the number of feet of lumber was only 103,669, according to log measure as agreed, and claimed \$100 damages for the negligent, unskilful, and wasteful way in which the lumber had been sawed and piled.

The plaintiff cross-appealed on the ground that the amount, \$71.95, awarded as damages to defendant Thompson was, upon the evidence, excessive, and that it also shewed that defendant Marshall was jointly liable as a principal.

H. L. Drayton, for defendant Thompson.

J. Idington, K.C., for plaintiff.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.—The action was rightly dismissed as against the defendant Marshall; though he had been willing to become jointly liable with defendant Thompson, that could not be accomplished without the latter's consent, and there is no evidence of such consent. If the plaintiff sue upon the transaction with Thompson, Marshall was neither directly nor indirectly a party to it: if upon the transaction with Marshall, he must recover against him only in the absence of evidence of his authority to bind Thompson; and if plaintiff sue Marshall as a guarantor of Thompson's debt, the action fails because the guarantee is not in writing. Holding judgment against Thompson, there was no other course but to dismiss the action, as was done, as against Marshall. Nor can the finding as to the balance due to the plaintiff upon his contract with the defendant Thompson be rightly disturbed; it is well supported in the great mass of contradictory evidence adduced at the trial. . . . It is enough to say that the conclusion as to the amounts has not been displaced upon, but is well supported by, the whole evidence in the case. Judgment, however, in such a case as this, ought not to have been given as if upon cross-actions, but the amount allowed in respect of defective work should have been deducted from the amount which would have been payable for the work if properly done, and in accordance with the contract, and judgment entered for the balance only. There is nothing to shew that any other than the usual judgment in such a case should be entered: see *Cope v. Hicks*, 2 Cr. & M. 214; *Lowe v. Holme*, 10 Q. B. D. 286; *Moore v. Gooderham*, 10 O. R. 451; *Girardot v. Welton*, 19 P. R. 162 and 201; *Ryan v. Fraser*, 16 L. R. Ir. 283. The defence of tender and payment into Court was not supported by the evidence.

Appeal allowed with costs. Judgment to be entered in the Court below for plaintiff for \$33.70 damages with costs as provided in Rule 1132.

Cross-appeal dismissed with costs, if there be any costs of it not taxable as costs of the appeal. The money in Court should be paid out to the defendant Thompson.

Blewett & Bray, Listowel, solicitors for plaintiff.

J. J. Stevens, Teeswater, solicitor for defendant Thompson.

Morphy & Carthew, Listowel, solicitors for defendant Marshall.

FERGUSON, J.

MARCH 5TH, 1902.

WEEKLY COURT.

RE ASSELSTINE.

*Statutes—Settled Estates Act—Who may not Petition—Partition Act
—Who may not Partition.*

Petition by executor and devisees of Sarah Asselstine, deceased, for order for sale under Settled Estates Act of certain land, or for leave to petition for partition of it or part of it. Michael Asselstine devised the land in question in 1870 to his two daughters Elizabeth and Sarah as tenants in common. Sarah died in 1885, and by her will devised her half interest to her sister for life, with remainder to certain nephews and nieces, the petitioners. Her will conferred upon the petitioner, the executor, a power to sell her half interest with the consent of the devisee, the life tenant, Elizabeth Asselstine.

J. H. Moss, for petitioners.

E. D. Armour, K.C., and G. F. Ruttan, Napanee, for Elizabeth Asselstine. Without the consent of the tenant for life, there is no jurisdiction under sec. 22 of the Settled Estates Act: *Re Taylor*, 1 Ch. D. at p. 431, 3 Ch. D. 145, construing sec. 16, the corresponding section in the English Act; see also *Ex p. Puxley*, 2 Ir. Eq. 237; *Re Atkinson*, 30 Ch. D. at p. 612, per Pearson, J.; *Re Merry*, 15 W. R. 307; *Re Hurd*, 2 H. & M. at pp. 201, 202, per Wood, V.-C.; *Middleton's Settled Estates Act*, pp. 30, 31; *Re Dennis*, 14 O. R. 267; and as to partition, *Murcar v. Boulton*, 5 O. R. 164, and *Fisken v. Ife*, 28 O. R. 595.

Moss, in reply, referred to the Partition Act, sec. 5: *Lawlor v. Lawlor*, 9 P. R. 455; *Martin v. Knowllys*, 8 T. R. 145.

FERGUSON, J., gave oral judgment at the opening of the Court the day following the argument, holding that under neither Act could an order be made.

Motion dismissed with costs.

J. Bawden, Kingston, solicitor for petitioners.

Morden & Ruttan, Napanee, solicitors for Elizabeth Asselstine.

STREET, J.

MARCH 7TH, 1902.

CHAMBERS.

CLERGUE v. MCKAY.

Discovery—Production — Privilege — Letters between Solicitor and Client—Nature of, must be Set Forth in Affidavit

Gardner v. Irvin, 4 Ex. D. 49, *O'Shea v. Wood*, [1891] P. 286, and *Ainsworth v. Wilding*, [1900] 2 Ch. 315, followed.

Hoffman v. Crerar, 17 P. R. 405, referred to.

Appeal by plaintiff from order of Master in Chambers dismissing plaintiff's application for a better affidavit on production from defendant Preston, who objected to produce certain letters between himself and H. & M., solicitors, "on the ground that they were all communications which passed between myself and my solicitors, H. & M., with reference to matters which are now in question in this action, and that the same are confidential communications between myself and my solicitors, and as such are privileged from production. 'That when the said communications passed between myself and the said H. & M., the said H. & M. bore to me the relationship of solicitors, and my said communications were written to them in their capacity of solicitors for me, and their communications to me were written by them in their capacity of solicitors for me, in reference to the matters which are now in question in this action.'" The evidence shewed that the solicitors acted as agents for the defendant Preston, who was the owner of the land in question, in offering to sell it to an agent for the plaintiff on the 13th December, 1899. At that time the legal estate was in the other defendant (the wife of one of the solicitors.) On the 12th January, 1900, she conveyed the legal estate to her co-defendant, Preston, and on that day the first of the letters was written by the solicitors to Preston. The next letter was from Preston to them on the 20th January, 1900. Then there was a letter from the solicitors to Preston on the 6th February, 1900, and one from him to them on the 10th February, 1900. There was then a gap in the correspondence until the 23rd May, 1900. The present action (for specific performance) was begun on the 29th May, 1900.

A. B. Aylesworth, K.C., and R. U. McPherson, for plaintiff.

W. M. Douglas, K.C., for defendant Preston.

STREET, J.—The affidavit on production must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth without any ambiguity whatever, in order that there may be no doubt as to its being privileged. The solicitors were acting as agents for the sale of the defendant Preston's land very shortly before the first letter was written; and it seems to be the beginning of the correspondence in question. It is not unreasonable to require that the client should give some more definite description of the correspondence than that it is written "in reference to the matters which are now in question in this action," for that description does not necessarily imply that the client was by his letters consulting the solicitors in their character of solicitors and re-

ceiving legal advice from them by the letters written by them to him: *Gardner v. Irvin*, 4 Ex. D. 49; *O'Shea v. Wood*, [1891] P. 286; and *Ainsworth v. Wilding*, [1900] 2 Ch. 315. This decision goes beyond *Hoffman v. Crerar*, 17 P. R. 405, but that case did not go as far as the authorities require. Appeal allowed. Defendant Preston to file a better affidavit. Costs in the cause.

Simpson & Rowland, Sault Ste. Marie, solicitors for plaintiff.

Hearst & McKay, Sault Ste. Marie, solicitors for defendant.

STREET, J.

MARCH 8TH, 1902.

CHAMBERS.

MORRISON v. GRAND TRUNK R. W. CO

*Discovery—Examination of Officer of Corporation—Railway Company
—Engine-driver—Rules 439, 461.*

An engine-driver is not an officer of a railway company examinable for discovery under Rule 439, especially having regard to the provision of Rule 461 (2) that his examination would be evidence against the company.

Appeal by defendants from order of Master in Chambers for examination by plaintiff of one Spratt, an engine-driver of defendants, for discovery, as an officer of the defendants. The action was brought by the widow of a conductor who was killed while in charge of a passenger train of defendants, to recover damages for his death. Spratt was the driver in charge of the engine of the train in question. One Costello, the defendants' roadmaster at the place of the accident, was present and took charge of the train, in place of deceased, when it proceeded.

D. L. McCarthy, for defendants.

J. G. O'Donoghue, for plaintiff.

STREET, J.—It is important to bear in mind the provisions of Rule 461 (2). . . . Under this Rule the examination of every one who is examined as an officer of the corporation is treated as evidence against the corporation in the same manner and to the same extent as the examination of a party is treated as evidence against himself. The result is, that a plaintiff in an action against a corporation has the advantage in many cases of giving important evidence against the defendants by means of the depositions, taken out of Court, of so called officers of the corporation, who may be unfriendly to it, and who are not seen by the jury unless called by the corporation as its own witnesses. We should not extend the meaning of Rule 439 to any class

of employees without being satisfied that they properly come within it.

In *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 541, 671, 13 P. R. 369, the grounds upon which it was considered by the Divisional Court and by Osler and MacLennan, J.J.A., in the Court of Appeal, that the conductor was examinable, were that he was intrusted by the company with the charge of their train in its transit, and that he was, therefore, for that particular occasion and purpose, to be treated as an officer.

These reasons do not appear to be applicable to the position of the driver of the engine attached to the train, for he, as well as the brakemen, is not in charge of the engine or the cars during their journey, but is under the control of the conductor.

[The learned Judge then referred to *Knight v. Grand Trunk R. W. Co.*, 13 P. R. 386; *Dawson v. London Street R. W. Co.*, 18 P. R. 223; and *Casselman v. Ottawa, etc., R. W. Co.*, 18 P. R. 261.]

None of these cases seems to me to extend the principle upon which a conductor was admitted by the Courts to be treated as an officer of the company. The principle would undoubtedly be extended at once to employees of an inferior grade, and the difficulty of drawing a line anywhere would be greatly increased, if we were to hold an engine-driver examinable under the Rule.

Appeal allowed.

Lee & O'Donoghue, Toronto, solicitors for plaintiff.

Bell & Biggar, Belleville, solicitors for defendants.

MACMAHON, J.

MARCH 7TH, 1902.

TRIAL.

BURRELL v. LOTT.

Easement—Right of Way—Repairs—Dominant and Servient Tenements—Water—Right to Flow of—Injunction.

Action (1) for a declaration that the defendant was not entitled to a right of way over the plaintiff's premises, or to maintain on the plaintiff's premises a certain pier, and for an injunction restraining the defendant from trespassing; (2) for a declaration that the plaintiff was entitled, in connection with his foundry business, to take and discharge into the tail race under the defendant's mill one-third of the water of the river Moira; (3) for an injunction restraining the defendant from obstructing the tail race or impeding the free discharge of waste water from the plaintiff's water wheel; (4) for a mandatory order upon the defendant to remove all obstructions from the tail race.

The action was tried without a jury at Belleville on the 19th, 20th, and 21st November, and at Toronto on the 24th December, 1901.

A. B. Aylesworth, K.C., and W. N. Ferguson, for plaintiff.

E. D. Armour, K.C., and E. G. Porter, for defendant.

MACMAHON, J.—The properties now owned by the plaintiff and defendant respectively were on the 5th January, 1867, conveyed in one parcel to the late Ellis Burrell and William Bleecker. . . . In July, 1870, Bleecker conveyed to Burrell his interest as a tenant in common. In the conveyance Bleecker covenanted to keep in repair the north part of the mill dam across the Moira, and Burrell to keep the south part in repair. Burrell died in 1882, and by his will devised to his son, the plaintiff, a portion of the property, called "the foundry property," and described as lying to the east of the lane leading from Mill street in the direction of the mill dam, and situate on the north side of Mill street, extending to the centre of the river, with the right to use the lane in common with the owners of the property to the west thereof; also the right to use the waters of the river to the extent of one-third thereof, flowing to the south of the river, and to discharge the waste water into the river at the most convenient place therefor, and subject to the charge of keeping the south half of the mill dam in repair to the extent of one-third of the expense thereof, etc. The testator also directed that, if his son-in-law Campion desired to purchase the property to the west of that devised to plaintiff, it was to be conveyed to him by the executors at the price of \$20,000. The executors, on the 11th April, 1882, conveyed the same to Campion. The description in this conveyance covered the whole lot, but there was excepted thereout the land devised to plaintiff. The conveyance was subject to the covenants in the deed from Bleecker to Burrell. In 1876 defendant Lott became the tenant from Ellis Burrell of the foundry building and water power, and continued as such till the latter's death in 1882; after which (the plaintiff then being 12 years old), his guardian leased the foundry proper to Lott, who remained tenant thereof till 1893, when he surrendered possession to plaintiff. Burrell's executors, under the power of sale in a mortgage made by Campion of the property conveyed to him, sold and conveyed to W. H. Potter and the defendant Lott in 1885, and Potter conveyed his interest to Lott in 1888.

Dealing first with what is called the "north pier." . . . James F. Serrex, who was in Ellis Burrell's employment prior to 1867, said that in the spring of that year the dam across the river, and a pier above the south end of the dam, were swept away by freshets. He said that, prior to the destruction of the dam, some cribbing was placed out from the bank of the river, as a retaining wall, to prevent the earth from being carried away from the bank into the river, during high water. This crib-work, built out 14 or 16 feet into the river, was known as "the fire-stand," or north pier. . . . Mr. Baker stated that the fire-stand had been altered a great many times by pieces being carried off from the end by the spring freshets, and if injured by the freshets of 1878 and repaired in that year, no appreciable extension was made to it. . . . I am, however, satisfied, and I so find, that it was not until 1887, after the fire-stand was injured by the freshet, and upon its being rebuilt, that it was extended to its present length into the river. . . . In 1885 the defendant became the owner in fee of the premises he now occupies, and in 1887 he was tenant of that portion owned by the plaintiff, so that, when the fire-stand was extended to its present position in the latter year, the defendant was in occupation of the whole property. . . . Even had I found that the extension to the north pier was made, in 1878, and therefore existed in practically its present condition when the defendant became the purchaser of his present premises, he could not claim a right of way over the plaintiff's land to make repairs to the dam and pier, unless it was a right of way occupied and enjoyed at that time as appurtenant to the premises. The 12-foot lane was designed as the way by which repairs could be made to the dam. The dam is west of the line of the plaintiff's foundry, which forms the eastern boundary of the lane, and the plaintiff, under the devise to him, is charged with one-third of the cost of keeping the dam in repair, with right of entry to repair. . . . As the pier did not exist in its present condition when the defendant purchased in 1885, nor did the pier then existing produce the beneficial effects which it is claimed are produced by the existing pier, the defendant cannot claim a right to repair it so as to keep it extended to its present position in the river. . . . The channel through which the water flows which propels the wheels under the plaintiff's foundry and the defendant's factory is an artificial one, and where that is the case "any right to the flow of the water rests on some grant or arrangement, either proved or presumed, from or with the owners of the

lands from which the water is artificially brought, or on some other legal origin:" *Rameshur v. Koonj*, 4 App. Cas. 121.

The first devise under the will of Ellis Burrell is of the foundry property to the east of the lane with "the right to use the waters of the said river to the extent of one-third thereof flowing to the south of the said river and to discharge the water into the said river at the most convenient place therefor." The most convenient place is that provided by the channel created therefor by the devisor, Ellis Burrell. And the down stream tenement was, as to the right to the flow of one-third of the water of the river, the servient tenement, and when the defendant became the purchaser thereof he was the servient owner, and as such must suffer the water to flow uninterruptedly over the servient tenement: *Godard on Easements*, p. 21. . . .

There is a very large diminution of the power to which the plaintiff is entitled, caused by the platform and wheel of the defendant obstructing the flow of the water through the flume and backing it up on the plaintiff's wheel.

Judgment for the plaintiff as prayed.

Millar, Ferguson, & Hughes, Toronto, solicitors for plaintiff.

E. G. Porter, Belleville, solicitor for defendant.

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[MARCH 3RD, 1902.]

DIVISIONAL COURT.

PRITTIE v. LAUGHTON.

*Specific Performance—Alteration of Written Offer—Onus of Proof—
Alternative Remedy in Damages—Effect of not Pleading—Dic-
tion Court—Solicitor's Duty and Risk in Choosing Forum.*

Croockewit v. Fletcher, 1 H. & N. 893, per Martin, B., approved.

Adderley v. Dixon, 1 S. & S. at p. 610, and Scanlan v. McDonough, 10 C. P. 104, referred to.

Appeal by plaintiffs from judgment of MEREDITH, C.J., dismissing action to compel specific performance of an agreement to sell certain land. The agreement or option gave plaintiffs a certain number of days within which to purchase. The trial Judge held that the plaintiffs had failed to make out a contract; that the document originally contained the word "thirty" where the word "ninty" in the document, as produced, was written, as the number of days within which the purchase was to be completed; that, in view of that, and looking at the extraordinary character of the instrument—all scratched—it could not be found, in the conflict of evidence, that the option was originally for ninety days; that defendant Peter Laughton did not know that the acceptance was written as declared by plaintiffs, and that, if it was so written, Laughton did not know it was there; and that, there having been a material alteration of the option, the plaintiffs could not succeed.

G. F. Shepley, K.C., for plaintiffs.

C. C. Going, Toronto Junction, for defendant.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.—If the right determination of this case depended entirely upon the single question, was the

writing in question altered as the defendants allege? the judgment should, I think, be reversed, because there is no finding that it was so altered, and the onus of proof of such is ordinarily upon the party asserting it. In a writing of this character an apparent alteration is ordinarily presumed to have been made before it was signed.

But the case is not one of that single and plain character. The action is for specific performance only, and no attempt to obtain in the alternative damages for breach of contract has been made, nor any evidence given sufficient to support such a claim.

And the case is so full of uncertainties that I cannot doubt specific performance was rightly refused, and if so there was no other course open than to dismiss the action.

The writing is of a slovenly character, in pencil only, illegible and misspelt, and no copy of it was made. A very fit subject for alteration without detection, and, making it still more unsatisfactory, it has been crossed and scored over and many words added, in pencil, so as to make it quite unintelligible, in some respects, without parol evidence. These are not matters entirely irrelevant to the issues in this action for specific performance of the agreement—relief not given *ex debito justitiæ*, but resting in the judicial discretion of the Court—nor necessarily in an action for damages. See *Moine v. Hendron*, 30 Miss. 110; *Addison on Contracts*, 9th ed., p. 175; and *Am. and Eng. Encyc. of Law*, 2nd ed., pp. 272-9.

See observations of Martin, B., in *Croockewit v. Fletcher*, 1 H. & N. at p. 912, which cannot be repeated too often, as to any tampering with or alteration in written documents, referring to *Davidson v. Cooper*, 13 M. & W. 778. . . . The plaintiffs assume quite too much in taking it for granted that the alteration has left the writing plain and legible—that the changed word is not plainly “ninty,” intended for ninety. That is not so, and consequently, the onus was upon them of proving the writing to be that which they allege it to be; quite a different case from one in which the alteration is plain on the face of the document, and there is nothing to prevent the presumption against its having been wrongfully made arising. The plaintiffs have not satisfied this onus of proof. The trial Judge has not found even that the word is “ninty,” and if the onus rested upon the plaintiffs of proving that when the writing was signed the word was “ninety,” the action was rightly dismissed.

There are also all the other circumstances of the case to be taken into consideration . . . and the fact that upon the evidence it must be found that one lot at least had been sold by the vendor before the date of the writing, and there

was therefore uncertainty as to price, preventing specific performance.

But, in addition to these circumstances, the case is one in which the plaintiff might well be left to his common law remedy for breach of contract. The lots, apparently about 20 in number, were to be sold for \$100 altogether, an average of \$5 each. They were bought to sell again for the purpose of speculation only. They were tax title lots in Toronto Junction. No one can doubt the feasibility of going into the market, and being able to buy abundantly of such lots. . . . It is not a case in which damages will not "afford a complete remedy." *Adderley v. Dixon*, 1 S. & S. 608. Here damages will completely compensate.

The plaintiffs' claim should, in my judgment, have been made in the Division Court for damages, and the question of the alteration have been there tried by a jury. No question of title to land is raised, and the Division Court has jurisdiction to award such damages up to \$60, three-fifths of the whole price of the lots together. As to a solicitor's duty and risk in bringing an action in a superior Court which might have been brought in an inferior Court, see *Scanlan v. McDonough*, 10 C. P. 104.

Appeal dismissed with costs.

W. Cook, Toronto, solicitor for plaintiffs.

C. C. Going, Toronto Junction, solicitor for defendant.

MARCH 12TH, 1902.

DIVISIONAL COURT.

HUME v. HUME.

Pleading—Counterclaim—Annuity—Executor.

Appeal by defendant from order of STREET, J., *ante* p. 156.

The same counsel appeared.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Mr. Bicknell has argued this very fully, and, I am sure, has said everything that possibly could be said in support of the appeal, but we think it is not necessary to take time to consider his argument.

What, practically, the defendant is seeking to do is to obtain a judgment for the administration of an estate, of which the plaintiff and two others are executors, and in which she and several others are interested, as next of kin, on a counterclaim in an action in which one of the executors, suing in her own right, is plaintiff.

In my opinion, the legislature did not contemplate that such a claim should be the subject of a counterclaim.

It is true that the language of the Rule giving the right to counterclaim is very wide, but I think it is not wide enough to cover a case of this kind.

Here this defendant has no debt or claim for which she could sue the plaintiff. She has a right as one of the next of kin to bring an action calling upon the plaintiff to account as a trustee or executrix for the moneys of the estate which have come to her hands. That action, notwithstanding Mr. Bicknell's argument, I still think is a class action, an action brought on behalf and for the benefit of all the next of kin of the estate for the purpose of having the accounts taken and the amount in the hands of the defendant distributed.

The only judgment which could result from the counterclaim, if it went to trial, would be a judgment for administration of the estate. It would be necessary to have the other executors before the Court; it would be necessary to have the other next of kin before the Court; and the result would be not a judgment that this defendant should recover from the plaintiff anything,—assuming a sum of money to be in the hands of the defendant,—but an order that the plaintiff pay into Court the amount in her hands, and the Master, or the person to whom the reference was directed, would determine the proportions in which that money would be distributed among the next of kin.

It put in Daniell that a next of kin cannot sue unless for an aliquot portion of an ascertained sum in the hands of an executor. There is no pretence here that there is any aliquot part of an ascertained sum in the hands of the defendants by counterclaim. What is claimed is that she has received the rents of the farm, and that she has not accounted for them, and that the plaintiff by counterclaim is entitled to a distributive share of the moneys in her hands.

I think it would be most inconvenient that an action of this kind, in which the other executors are concerned, and in which the other next of kin are concerned, should be tacked on to an action to recover a legacy to which the plaintiff is entitled under the will; and to treat the provisions of the Rule as to counterclaim as extending so far as to include such a counterclaim would be to create a condition that would be most unsatisfactory, bringing into the suit and tying up along with it an action for the administration of the estate.

I think the order appealed from was right, and that the appeal should be dismissed with costs to the respondent in any event.

BRITTON, J.

MARCH 13TH, 1902.

TRIAL.

BIBBY v. DAVIS.

Public Health—Board of—Contagious Disease—Engaging Physician to Attend—Liability to Pay—Medical Health Officer not Personally Liable—Mandamus—R. S. O. 1897 ch. 248, secs. 33, 48, 66.

Action against defendant Dainard as medical health officer and the other defendants as the local board of health of the township of Euphrasia, tried at Owen Sound with a jury.

S. G. McKay, Owen Sound, for plaintiff.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for defendants.

BRITTON, J.—The plaintiff, a physician, seeks to recover \$560 for attendance on a smallpox patient for 56 days at \$10 a day, value of clothing, articles, etc., destroyed by order of the board. Upon the answers of the jury and the whole case, I find that there is no personal liability on the part of the defendant Dainard. He is not a member of the board: see secs. 33, 48, and 66, R. S. O. 1897 ch. 248. Plaintiff is entitled to recover for 25 days at \$7 a day and \$6.90 for clothing destroyed. The jury found 25 days a reasonable time, and, as the bargain made with defendant Fawcett was for \$7 a day as long as the board required his services, it should pay not only for the 12 days plaintiff was actually in charge of Smith, but for the 15 days he was in quarantine afterwards; but I see no authority for allowing against the board the value of property which ought to have been destroyed but was not destroyed: see sec. 100. The jury found that all ought to have been destroyed, and fixed the value at \$30. In the absence of any specific evidence as to a larger value, I fix it at \$6.90. The articles not destroyed belong to plaintiff, and he may take them. Judgment accordingly for plaintiff, less \$83.90 paid into Court, and for High Court costs. The order for mandamus to the board to sign an order to the township council for the amount must also be granted. It is a case where within the authorities the relief by mandamus may properly be termed ancillary relief: see *Ward v. Lowndes*, 28 L. J. Q. B. 265; *Worthington v. Hutton*, L. R. 1 Q. B. 63; *Webb v. Commissioners*, L. R. 5 Q. B. 642. The board have no funds,

but they can make contracts, sue and be sued, and the township must provide money and pay it upon the order of the board or any two members. The mandamus order should be as in *Re Derby and Local Board of Health of Plantaganet*, 19 O. R. 51, directing all the members to sign the order asked for. It is a case for High Court costs. The letter of defendant Dainard, who met with the board and acted as one of them, though not a member, might well lead plaintiff to suppose he could recover the larger amount.

McKay & Sampson, Owen Sound, solicitors for plaintiff.

Lucas, Wright, & McArdle, Owen Sound, solicitors for defendants.

BRITTON, J.

MARCH 12TH, 1902.

TRIAL.

FERGUSON v. ARKELL.

Sale of Goods—Stallion—Warranty—Breach.

Action for a rescission on the ground of fraud of a contract for purchase by plaintiffs of a stallion called Whitby for the price of \$1,400, and for an injunction.

S. G. McKay, Owen Sound, for plaintiffs.

H. L. Drayton and J. J. Stevens, Teeswater, for defendant.

BRITTON, J.—The defendant employed one Ferguson and one Armstrong to assist him in selling the horse to a syndicate, the plaintiffs, and the sale was effected on 14th May, 1901, for \$200 in cash and three notes of \$400 each. The sale was upon the representation by the defendant that the "horse was good and sound, not more than ten years old, and a sure foal-getter." Each of the plaintiffs relied upon practically the same representation made by defendant or one or both of his agents, and he and they intended the representations to be relied on, and knew they were false. I find that at the time they were made and on the sale that the horse was unsound, over ten years old, and not a sure foal-getter. The defendant left his former home so as to avoid a tender of the horse, but the plaintiffs, I find, elected on discovering the fraud to rescind the contract and are entitled to do so. The defendant is entitled to the horse and may take him away at any time; if he refuses, plaintiffs may sell him and apply proceeds on account of their claim. The plaintiffs are entitled to indemnity against payment of any of the notes, and need not pay the \$200, which, for some reason, was not paid in cash. Judgment for plaintiffs for

\$1,200 and interest. The amount of any notes returned are to be credited on the judgment. Any plaintiff is entitled to contribution from his co-plaintiffs if he pay any note. Each plaintiff was an owner of a one-sixth share in the syndicate except William Richardson, who has two-sixths. High Court costs to plaintiffs. Injunction against defendant restraining him from parting with the two remaining notes continued.

R. Vanstone, Wingham, solicitor for plaintiffs.

J. J. Stevens, Teeswater, solicitor for defendant.

FALCONBRIDGE, C.J.

MARCH 12TH, 1902.

WEEKLY COURT.

McCLENAGHAN v. PERKINS.

Executors and Trustees—Negligence—Mismanagement—Breaches of Trust—Compensation.

Appeal by defendant Perkins and his assignee for creditors, defendant Mutchmor, from report of Master at Ottawa, and cross-appeals, by plaintiff and defendants H. D. and H. V. Lyon from report of Master at Ottawa, heard at Ottawa.

T. A. Beament, Ottawa, for defendants Perkins and Mutchmor.

W. J. Code, Ottawa, for plaintiff.

T. F. Barrett, Ottawa, for defendant Lyons.

FALCONBRIDGE, C.J.— . . . The findings of the Master are correct and should be sustained on the questions raised by the appeal and cross-appeals, except as to the compensation allowed to the executor, defendant Perkins, who (1) kept no books, (2) failed to invest the estate moneys, though directed to do so, (3) overpaid one of the heirs, (4) allowed taxes to run greatly into arrears, (5) paid large portions of the corpus to beneficiaries before the period of vesting, contrary to the terms of the wills; and, assuming that the estates will lose nothing, though the executor has assigned to defendant Mutchmor, the executor is not on the above facts entitled to any compensation. The plaintiff and the defendants will have their costs against the executor and his assignee of this appeal and of the cross-appeals; the report will be amended by disallowing the \$1,900 for compensation; and judgment will go in terms of the report as amended.

OSLER, J.A.

MARCH 10TH, 1902.

C. A.-CHAMBERS.

RE EMPLOYERS' LIABILITY CORPORATION AND
EXCELSIOR LIFE INSURANCE CO.

Leave to Appeal—Appointment of Sole Arbitrator.

Leave to appeal from order of a Divisional Court, *ante* p. 87 and 3 O. L. R. 93, was granted.

STREET, J.

MARCH 10TH, 1902.

WEEKLY COURT.

CITY OF TORONTO v. BELL TELEPHONE CO. OF
CANADA.

Constitutional Law—Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone Company—Right to Carry Poles and Wires along and across Streets—Consent of Municipality—Dominion and Provincial Statutes—Construction—Inconsistent Provisions.

Special case stated by the parties and heard on the 26th February, 1902.

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for defendants.

STREET, J., held as follows:—

1. Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies, with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads mentioned in sec. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

2. While the defendants were duly and properly incorporated under their special Act, 43 Vict. ch. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or corporations, and could not do so until authorized by an Act of the Provincial Legislature.

3. The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 Vict. ch. 71 (O.) was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 Vict. ch. 95 (D.) was passed, amending their Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works thereunder authorized were for the general advantage of Canada.

Held, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act were no longer binding; and the defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

4. By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, but one important qualification was, "that in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wires less than 22 feet above the surface of the street, nor carry any such poles or wires along any street without the consent of the municipal council."

Held, that the effect of this latter provision was to forbid the defendants carrying *any* poles or wires at all along any street without the consent of the council—not merely poles or wires of the height described in the previous part of the same sentence.

5. The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works

in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.

6. Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires *across* streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

Thomas Caswell, solicitor for plaintiffs.

S. G. Wood, solicitor for defendants.

LOUNT, J.

MARCH 14TH, 1902.

WEEKLY COURT.

RE CITY OF KINGSTON AND KINGSTON LIGHT,
HEAT, AND POWER CO.

Arbitration and Award — Voluntary Submission — Construction of Agreement—" Works and Property"—" Franchises and Goodwill"—Ejusdem Generis Rule—54 Vict. ch. 107—R. S. O. ch. 191—R. S. O. ch. 164, sec. 99.

Anderson v. Anderson, 1 Q. B. D. at p. 753, Church v. Mundy, 15 Ves. at p. 406, and Toronto Railway Co. v. Toronto, 20 A. R.125, [1893] A. C. at p. 515, referred to.

Appeal by the company from an award of arbitrators or for an order setting aside the award.

The company is incorporated by 11 Vict. ch. 6 (O.), and by sec. 35 its corporate existence was limited to 50 years. By 54 Vict. ch. 107, sec. 10, sec. 35 was repealed and the time limited to 20 years, but the corporation at any time was given power to expropriate the company's works and property pursuant to R. S. O. 1887 ch. 164, at any time upon giving 12 months' previous notice of intention so to do. In July, 1896, an agreement for 5 years was made between the parties by which at the expiration of it, having given the notice, the corporation was to be at liberty to purchase—sec. 11—"all the works, plant, appliances, and property of the

company used for light, heat, and power purposes, both gas and electric," at a price to be fixed by three arbitrators upon a reference under the Municipal Act, a majority of whom made the award in question, which fixes (1) the value of the works, etc., at \$170,173, (2) the value of the franchises conferred by 54 Vict. ch. 107 (O.), at \$80,000, and (3) finds that the ten per cent. in addition provided for in R. S. O. 1887 ch. 164, sec. 99, and incorporated with 54 Vict. ch. 107 (O.), has not been included in arriving at the value of the works or of the franchises.

R. T. Walkem, K.C., and J. L. Whiting, K.C., for the company.

D. M. McIntyre, Kingston, for the corporation.

LOUNT, J.—In my opinion the determination of the question is not to be decided by the meaning of the word "property," but by the fair interpretation and construction of the agreement. . . . The parties have by their agreement, sec. 11, agreed that the corporation shall have the option of purchasing and acquiring all the works, etc. The submission is a voluntary one and not under sec. 10 of 54 Vict. ch. 107. Clause 12 provides that the corporation, forthwith after giving notice of intention to purchase, shall have access to the works, plant, property, and appliances of the company. Clause 15 provides that, in the event of the works, plant, and property of the company being acquired by the corporation, then the company shall cease to exist as a corporate body for the purposes for which they were constituted, except as far as may be necessary to wind up the affairs of the company, and shall surrender, assign, transfer, and set over to the corporation all their rights, franchises, privileges, and immunities. In my opinion, the word "property" as used in these clauses can only be held to mean tangible, and not intangible, property, such as the franchise or goodwill of the company. The corporation were not under any necessity to purchase and acquire the franchise of the company. For all purposes necessary the corporation could and can operate under and by virtue of the Municipal Light and Heat Act, R. S. O. ch. 191. What was agreed to be paid for under clause 11 are the works, plant, appliances, and property used for light, heat, and power purposes. I think the doctrine of *ejusdem generis* applies. In *Anderson v. Anderson*, 1 Q. B. D., Lord Esher says, at p. 753, "nothing can well be plainer," etc. The word "property" as used in the agreement is, on the fair construction of the instrument, limited to the preceding words, and these

words are not to be construed so as to include such an intangible right as the franchise or goodwill of the company. In *Church v. Mundy*, 15 Ves., Lord Eldon says, at p. 406, "The best rule of construction," etc. The limited sense is, I think, shewn in clause 12, where it is provided that the corporation shall have access to the works, plant, property, and appliances of the company. What is here meant is access to the tangible property. Again, as I read clause 15, the corporation having acquired the tangible property at a price to be fixed by arbitration, the company ceases to exist, and, as part of the bargain, surrender or yield up, without other consideration, their franchises and rights. Moreover, by clause 15, the words "rights, franchises, privileges, and immunities" are expressly used, and these words are not used in the preceding clauses. If it had been intended that the value of the rights, franchises, etc., was to be paid for at a price to be fixed by arbitrators, one would expect to find express provision made, or appropriate words used in clauses 11 and 12. By the Act, *supra*, the rights and privileges were terminable at the option of the company in 20 years, i.e., 1911. See *Toronto Street Railway Co. v. Toronto*, 20 A. R. 125, [1893] A. C. 506, per Sir Richard Couch, at p. 515, quoting with approval the judgment of Burton, J.A. The time being shortened, the same result would apply at the end of 5 years as at 20 years—the privileges and franchises would cease. I do not think the ten per cent. provided for by R. S. O. ch. 164, sec. 99, can be allowed, because it is to be allowed upon expropriation, apparently as consideration for it and as compensation for disturbance and for interference with and determination of the company's rights and privileges against the assent of the company. That is not this case. The submission is voluntary. Nothing is said about the 10 per cent. in the agreement, and that must control and not the Act. Motion dismissed with costs.

D. M. McIntyre, Kingston, solicitor for corporation.
Walkem & Walkem, Kingston, solicitors for company.

MARCH 11TH, 1902.

DIVISIONAL COURT.

REILLY v. McDONALD.

Specific Performance—Statement of Vendor as to Quantity of Land Sold—Shortage of 20 Acres out of 125 Acres—Effect of—Laches.

Appeal by plaintiffs from judgment of MACMAHON, J., in action for specific performance of an agreement to sell lot

13 in the 4th concession east of Yonge street, in the township of York, containing 125 acres of land. The trial Judge found on the evidence that defendant was not aware that 20 acres had been sold off the lot, but had been told and believed that it contained about 125 acres, and that plaintiffs not owning the whole lot could not succeed: *Moorehouse v. Hewish*, 22 O. R. 172; and, also, that on account of their delay the plaintiffs could not succeed: *McClung v. McCracken*, 2 O. R. 609; *Nason v. Armstrong*, 22 O. R. 542.

J. O'Donohoe, K.C., and William Norris, for plaintiffs.

E. E. A. DuVernet and W. H. Grant, for defendants.

The judgment of the Divisional Court (FERGUSON, J., ROBERTSON, J.) was delivered by

FERGUSON, J., who held that the judgment below was correct and should be affirmed, and that the plaintiffs did not appear to have proved an agreement upon which this or any action could be maintained. Appeal dismissed with costs.

J. O'Donohoe, Toronto, solicitor for plaintiffs.

Duncan, Grant, Skeans, & Miller, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J.

MARCH 13TH, 1902.

TRIAL.

RAT PORTAGE LUMBER CO. v. KENDALL.

Sale of Goods—Counterclaim—Onus of Proof.

Action tried at Rat Portage and Toronto, to recover price of lumber and building material and interest on price and for money lent, and upon counterclaim for towing, sawing, splitting, and delivering to plaintiffs 2,520 cords of wood, and for other towing, and half profits on sale of cordwood, pursuant to an alleged agreement.

N. W. Rowell and J. W. Moran, Rat Portage, for plaintiffs.

R. C. Clute, K.C., and A. C. Boyce, Rat Portage, for defendant.

FALCONBRIDGE, C.J.—Held that the evidence was conflicting as to matters set up in the counterclaim, and that defendant had not satisfied the onus of proof. In the result the plaintiffs are entitled to judgment for \$1,358.07, less \$327.50, to which latter sum defendant is entitled to credit as representing the value of work and labour received by plaintiffs from him. No costs. Thirty days' stay.

Langford & Moran, Rat Portage, solicitors for plaintiffs.

Boyce & Draper, Rat Portage, solicitors for defendant.

MARCH 13TH, 1902.

DIVISIONAL COURT.

TORONTO GENERAL TRUSTS CORPORATION v.
WHITE.

*Landlord and Tenant—Lease—Purchase of Buildings by Lessor at
End of Term—Valuation by Arbitration—Interest on Amount of
Award—Possession Given to Lessor.*

Appeal by plaintiffs from judgment of MACMAHON, J., upon a special case stated for the opinion of the Court. The lease in question contained a proviso for the valuation, at the end of term, of the buildings on the land, by three indifferent persons, and also provided that the reference should be entered upon, and award made, within 6 months next preceding the 1st day of November, 1900, and that within six months from said 1st day of November, the value of the buildings should be paid, with interest at 7 per cent. per annum from said 1st day of November. Arbitrators were duly appointed, and the parties agreed to extend the time for award for one month, and also until such further time as the arbitrators might extend the same. On 31st October, 1900, the lessee gave up possession, and on the 30th November, 1901, the award was made. The Judge below held that the plaintiffs, who are the executors of the deceased lessee, were not entitled to interest on the amount of the award from the 1st day of November, 1900, until the making of the award, or for any portion of the said period from the 1st day of November, and the making of the award.

F. E. Hodgins, for plaintiffs.

W. Laidlaw, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

BRITTON, J.—The defendants were, as to the buildings, in the position of purchasers in possession, and the general rule in such cases is that the purchaser pays interest: *Birch v. Toy*, 3 H. L. Cas. 565. The test as to payment of interest seems to be possession. *McCullough v. Clemow*, 26 O. R. 467, is not at all like the present case. Where title is not accepted at the time of taking possession, interest is payable on the purchase money from the time of taking possession. *Pigott v. G. W. R. W. Co.*, 18 Ch. D. 146, shews that interest will run from the time when the purchaser may prudently take possession. See also *Ballard v. Shutt*, 15 Ch. D. 122.

Appeal allowed and judgment directed to be entered for plaintiffs for \$1,000 with interest at 7 per cent. from 1st November, 1900.

McMurrich, Hodgins, & McMurrich, Toronto, solicitors for plaintiffs.

Laidlaw, Kappele, & Bicknell, Toronto, solicitors for defendants.

MARCH 13TH, 1902.

DIVISIONAL COURT.

STEVENS v. CITY OF CHATHAM.

Municipal Corporations—Granolithic Sidewalk—Repair—Accumulation of Ice and Snow—Damages—Negligence.

Appeal by plaintiffs, husband and wife, from judgment of STREET, J., at the trial at Chatham, dismissing the action, which was brought to recover damages for injuries received by the wife from a fall on the sidewalk in the city owing to the alleged gross negligence of the defendants in permitting the sidewalk to be and continue in a dangerous state and out of repair owing to an accumulation of snow and ice. The wife on the 11th March, 1900, slipped and fell and broke her thigh bone and sustained other injuries. The sidewalk was a granolithic one, a little lower than the boulevards on each side of it. There was a sort of furrow in the middle of the accumulated snow with icy ridges on each side.

A. B. Aylesworth, K.C., for plaintiffs. The condition of the sidewalk was distinctly dangerous, and that condition had existed long enough to make it gross negligence on the part of the defendants to suffer it to continue.

M. Wilson, K.C., for defendants.

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

FERGUSON, J., holding that there was no evidence of gross negligence, and that the evidence fully warranted the finding below. Appeal dismissed with costs.

J. B. Rankin, Chatham, solicitor for plaintiffs.

Wilson, Kerr, & Pike, Chatham, solicitors for defendants.

MARCH 13TH, 1902.

DIVISIONAL COURT.

REX v. MCKINNON.

Statutes—Ontario Summary Convictions Act, sec. 2—Time within which Information must be Laid—Criminal Code, sec. 841.

Motion to make absolute an order nisi to quash a conviction of defendant for that in April, 1900, at the town of

Durham, he did erect on lot 11 on the west side of Garafraxa street, within the area of the fire limits established by by-law 336, a frame building.

N. W. Rowell, for defendant.

W. R. Riddell, K.C., for prosecutor.

Per Curiam (MEREDITH, C.J., MACMAHON, J., LOUNT, J.)—The Ontario Summary Convictions Act, R. S. O. ch. 90, sec. 2, has the effect of incorporating in it sec. 841 of the Criminal Code, and the information not having been laid within six months of the alleged offence, the conviction must be quashed. Order accordingly. No costs. Usual order for protection of magistrate.

Lucas, Wright, & McArdle, Owen Sound, solicitors for defendant.

J. P. Telford, Durham, solicitor for plaintiff.

MARCH 11TH, 1902.

DIVISIONAL COURT.

PHILLIPS v. MALONE.

Writ of Summons—Service out of Jurisdiction—Rule 162 (c)—Contract—Place of Performance—Quebec Law—Discretion.

The defendants, having been served with a writ of summons and order allowing the issue of such writ for service out of the jurisdiction, moved to set the same aside as having been improperly allowed. The Master in Chambers made the order as asked, and on appeal Meredith, C.J. (3 O. L. R. 47), affirmed the Master's order. The plaintiff appealed.

J. A. Worrell, K.C., for plaintiff.

George Kerr, for defendants.

A Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) affirmed the orders below.

ROBERTSON, J.

MARCH 12TH, 1902.

TRIAL.

MILNER v. KAY.

Patent for Invention—Automatic Stools — Infringement — Foreign Patent—Application "within one year" for Canadian Patent—Evidence Admissible to Shew Invention in use, &c., before Patent—Onus of Proof—Modern Policy of Courts more Liberal to Protect Patents.

The plaintiff is the owner of two Canadian patents for certain new, useful, and valuable improvements on auto-

matic stools, one dated 25th November, 1897, and numbered 57,537, and the other dated 5th May, 1898, and numbered 59,888. He obtained a foreign patent in respect of his invention on 8th September, 1896, and applied for his first Canadian patent on 8th September, 1897. The action is to restrain defendants from infringing the patents and from manufacturing and selling the articles.

A. Mills and W. E. Raney; for plaintiff.

Frank Denton, K.C., and H. L. Dunn, for defendants.

ROBERTSON, J.—The 8th section of the Patent Act provides that “any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada, may obtain a patent in Canada, if the same is applied for within one year. . . .” After a full consideration of the cases I find that the plaintiff applied within the year as required by the section: *McWilliams v. Nash*, 28 Beav. 93; *Russell v. Ledsam*, 14 M. & W. 574, per Parke, B., at p. 581; *Webb v. Fairmaine*, 3 M. & W. 473; *Gurney v. Higgon*, 6 M. & W. 49; *Thomson v. Quirk*, 18 S. C. R. 695. . . . On the whole evidence I also find that the defendants have failed to establish that the invention covered by plaintiff’s patent, numbered 59,888, was known or used by any other person before the plaintiff’s invention, and which has been in practical use or on sale, with the consent or allowance of the inventor, for more than one year previously to his application for patent therefor in Canada, and plaintiff is within the provisions of sec. 7. And, having regard thereto, and to sub-sec. 16 (6) (d), evidence may be given shewing that, before the patent, the invention was known, or was in possession of the public with the allowance of the inventor, and if this is established it vitiates the patent: *Reg. v. La Force*, 4 Ex C. R. 14; *Smith v. Greey*, 11 P. R. 169: but the evidence fails to establish such knowledge or possession. . . . The onus was on defendants, and they have not satisfied it: see on this point *Ehrlich v. Shlee*, 5 R. P. C. 206, 207; *Neilson v. Betts*, L. R. 1 H. L. 15, 24; *Lyon v. Goddard*, 10 R. P. C. 33, 11 R. P. C. 354. . . . To defeat a new patent it must be clear that the antecedent specification disclosed a practical mode of producing the discovery which was the object and effect of the subsequent discovery: *Betts v. Menzies*, 10 H. L. C. 117; *Morrison v. American B. W. Co.*, 6 R. P. C. 518; *Thierry v. Rickman*, 12 P. R. C. 412, 428; *Von Heyden v. Newstadt*, 14 Ch. D. 230; *Hill v. Evans*, 4 DeG. F. & J. 288. . . . The Courts are now more liberal in protecting patents: *Carter v.*

Rose, 30th April, 1890, per Boyd, C.; and Ridout on Patents, p. 36. . . . The best evidence of the improvements in plaintiff's invention is that it has gone into general use, and this turns the scale in his favour: *Dion v. Dupuis*, Q. R. 12 S. C. R. 473; *Smith v. Dental, &c., Co.*, 93 U. S. R. 495. Judgment for plaintiff with reference to Master in Ordinary. Costs to plaintiff on High Court scale.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for plaintiff.

Denton, Dunn, & Boulton, Toronto, solicitors for defendants.

MARCH 12TH, 1902.

DIVISIONAL COURT.

RE DOOLITTLE v. ELECTRICAL MAINTENANCE
AND CONSTRUCTION CO.

*Division Courts — Prohibition — Jurisdiction — Cause of Action—
Whole Cause must Arise within Limits of Court.*

Appeal by defendants from order of MEREDITH, C.J., in Chambers, refusing a motion for prohibition to the 2nd Division Court in the District of Muskoka, which was made upon the ground that the whole cause of action did not arise, nor did the defendants reside within the jurisdiction of the Division Court. The action was for damages to the plaintiff's land by flooding. The land is in the jurisdiction of the Division Court, and the plaintiff resides therein. The evidence shewed that the flooding was caused by the raising of the waters of the river Severn, and that this was caused by the defendants' dam, which was not within the jurisdiction, and which they were authorized by 62 Vict. ch. 64 to erect.

F. A. Anglin and R. D. Gunn, Orillia, for defendants.

F. G. Evans, Orillia, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—To sustain the jurisdiction of the Division Court, it must be shewn that the whole cause of action arose within its limits. To succeed in the action plaintiff must shew damage, and that it was sustained from the wrongful act of defendant. The erection of the dam was the act of the defendant, and the damage to the plaintiff was consequential upon that act. The plaintiff must plead not only damage, but the manner in which defendant is charged with having caused it, and then defendant has a right to traverse

the allegation that the damage was caused by his dam: see Bullen & Leake, 2nd ed., p. 367, and also Foot v. Edwards, 3 Blatchford (Conn.) Circuit Reports 310; Gould on Waters, 3rd ed., pp. 720-1. Appeal allowed with costs and prohibition granted with costs.

F. G. Evans, Orillia, solicitor for plaintiff.

R. D. Gunn, Orillia, solicitor for defendants.

BRITTON, J.

MARCH 10TH, 1902.

CHAMBERS.

WEBLING v. FICK.

*Parties — Adding Plaintiffs — Consent — Verification by Affidavit—
Identity of Names.*

Appeal from order of local Judge at Brantford adding F. Pritchard & Co. as parties plaintiffs.

Action for damages for breach of an agreement to sell and deliver certain apples. Upon the consent of Pritchard & Co. to their addition as plaintiffs being filed, it was found that the witness to that consent, which was executed in Liverpool, England, and not verified by affidavit of execution, bore the identically same name as the witness who signed as to the execution of the agreement in Brantford, Ontario, in respect of which the action was brought. The local Judge, however, made the order.

J. E. Jones, for defendant.

W. S. Brewster, K.C., for plaintiffs.

BRITTON, J.—The consent of Fred. Pritchard & Co. to having their names added as plaintiffs should be proved not necessarily by the subscribing witness, but by an affidavit satisfying me that the consent was really signed at Liverpool, as it purports to be. If the consent was forwarded for signature and returned in due course signed, and if the subscribing witness was in Liverpool on the 3rd January, 1902, that can be shewn. If shewn within one week, the appeal is to be dismissed and plaintiff allowed to add P. & Co. as plaintiffs. The plaintiff Webling to consent that the money deposited as security for costs shall stand as security for P. & Co., and without prejudice to defendant's applying for security for costs from P. & Co. Costs of appeal to be to

defendant in any event. If consent was not filed, appeal to be allowed with costs.

Brewster, Muirhead, & Heyd, Brantford, solicitors for plaintiffs.

Kelly & Porter, Simcoe, solicitors for defendant.

MARCH 15TH, 1902.

DIVISIONAL COURT.

HALL v. ALEXANDER.

Easement—Dominant and Servient Tenement—Covenant by Original Grantor—Discharge of Snow and Water from Roof of Dominant Tenement—Duty of Owner of.

Wheeldon v. Burrows, 12 Ch. D. 31, followed.

Appeal by defendant from judgment of junior Judge of County Court of York granting an injunction and damages. The plaintiff is the owner of house No. 18 Classic avenue in the city of Toronto, and the defendant is the owner of the adjoining house, No. 20, and ice and snow and water are discharged from his house on to the side entrance to plaintiff's house. One Turner formerly owned the land and built and sold the two houses (18 and 20) thereon, selling first to the defendant's predecessor in title. The trial Judge held that at the time of the severance of the properties the eave on the projection of the house of defendant was in existence, and shewed that it was contemplated that the water should be carried off in that way, and that as to the snow and ice, the law will not permit a land owner to create easements of a novel character, and annex them to the soil so as to bind it in the hands of future owners, and that such an easement as here claimed was not unknown: Goddard on Easements; and that there was no evidence to shew that an easement had been established either expressly or impliedly.

G. H. Watson, K.C., for defendant. The conveyance from Turner contained a clause giving the "right and privilege and use of the projection of the roof of the house (No. 20) as at present constructed over and above that part of lot 47 immediately to the east of the house," and a covenant for quiet and undisturbed enjoyment of the projection as at that time constructed, and that the grantor upon a sale of the other portion of land should reserve the right to the projection.

E. E. A. DuVernet and W. W. Vickers, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C. J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The judgment of the learned Judge below cannot be sustained. It is abundantly clear that the want of repair of the eavetrough is not the cause of the trouble. The real question is whether the defendant, whose roof and eavetrough are in precisely the same shape and condition as when the original conveyance was made by Turner to predecessor in title of defendant, is bound to prevent snow and water discharged from the clouds upon his roof from falling upon the piece of plaintiff's land in question. He is not so bound: *Wheeldon v. Burrows*, 12 Ch. D. 31, per Thesiger, L. J. At the time of the grant from Turner to the plaintiff's predecessor in title on 27th February, 1888, the two houses in question had been built, and the easement of shedding snow and water, as has been done ever since, was necessary to the reasonable enjoyment of the property granted. Any doubt upon this point is set at rest by the express terms of the grant, which expressly gives the right "to use the roof as at present constructed" over the portion of land which was retained by the grantor. It is quite plain that the grantor could not, after such a grant, insist upon the grantee altering the construction of the roof so as to prevent the snow and water from coming down; and the plaintiff stands in no higher position than the original grantor, Turner. The special grant of the right to maintain the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must, to a large extent, descend upon the land below. Appeal allowed with costs and action dismissed with costs.

W. W. Vickers & Co., Toronto, solicitors for plaintiff.

Watson, Smoke, & Masten, Toronto, solicitors for defendant.

MARCH 11TH, 1902.

DIVISIONAL COURT.

THOMPSON v. COULTER.

*Sale of Land—Purchase Money—Payment—Evidence—Corroboration
—Onus of Proof.*

Appeal by plaintiffs from the judgment of the Chancellor, delivered at the trial which took place at Sandwich on the 7th October, 1901, dismissing the action with costs.

F. E. Hodgins, for plaintiffs.

R. U. McPherson, for defendant.

The judgment of the Court (MACMAHON, J., STREET, J., LOUNT, J.) was delivered by

MACMAHON, J.—The plaintiffs are the executors of the estate of John David Thewes, who died on the 6th September, 1900, at the age of seventy-four or seventy-five years; and the action is brought to recover from the defendant the sum of \$1,000 received by the defendant under the following circumstances:—Thewes was a farmer living in the township of Romney, in the county of Essex; he and the defendant, who is a farmer and cattle dealer in the same township, being on terms of intimacy. Thewes lived alone on his farm, and becoming ill, he was, in February or March, 1899, removed to St. Joseph's hospital, in Chatham, where until his death he occupied a room, never leaving the hospital. He advertised his farm for sale, and the defendant, desiring to purchase, saw Thewes, on the 10th or 11th May, who agreed to sell for \$2,500, the defendant to pay in cash the difference between that sum and the amount of a mortgage thereon held by a loan company in London, for \$1,000, and the interest then due thereon and the accrued taxes. The defendant on the 12th May paid \$300 odd, and before Thewes would sign the deed he insisted on Coulter depositing the balance of the purchase money, amounting to \$1,000, to his (Thewes's) credit in the Merchants Bank, Chatham, which the defendant did and brought to Thewes, at the hospital, a savings bank deposit book therefor.

On the 29th May, Coulter went to the hospital, and he stated that Thewes desiring him to withdraw the \$1,000 from the bank, Thewes signed his name on a piece of paper, which he (Coulter) took to the bank, but the bank would not pay the amount on deposit unless upon a receipt signed by Thewes therefor, and Coulter was given a blank receipt, which Thewes signed,—the body of the receipt being filled in by Coulter. Coulter, having received the money from the bank, stated when in the witness box that he on the same day handed it over to Thewes, who, after counting it, folded it in a piece of paper which he put in his breast, inside his clothing.

When Thewes died, the money was not found in his possession.

In July, Thewes gave to the Rev. Pierre Langlois an order addressed to Coulter, saying: "I ask Father Langlois

to see you about my money. I wish him to have it to be put in the Merchants Bank at Tilbury in trust for me." Father Langlois said he wrote Coulter telling him what was contained in the order, and Coulter while in the box stated that he subsequently saw Thewes and told him of the receipt of the letter from Father Langlois, when Thewes replied, not to mind what the priest said. It is therefore apparent that at the time of this conversation the minds of both Coulter and Thewes were directed to the order given by Thewes as to the money which the latter alleged was in Coulter's possession, and to the demand he had directed Father Langlois to make.

There was no corroboration whatever of the defendant's statement as to his payment of the \$1,000 to Thewes, the learned Chancellor holding that the onus of proving that it had not been received by the deceased rested on the plaintiffs. With great respect, I think he erred in so holding. Without adverting to other facts appearing in evidence, I think those to which I have referred are sufficient to cast the onus upon the defendant of shewing that the money was paid over by him to Thewes.

The appeal must be allowed and the judgment directed to be entered for the defendant set aside, and judgment entered for the plaintiff for \$1,000, with interest from the 29th May, 1900, with costs, including the costs of this motion.

Davis & Healy, Windsor, solicitors for plaintiffs.

J. W. Hanna, Windsor, solicitor for defendant.

STREET, J.

MARCH 14TH, 1902.

TRIAL.

GURNEY v. TILDEN.

Costs—Adding Defendants—Formal Order.

At the trial on 29th June last, the question was reserved as to the disposition of the costs of certain parties (other than the infant defendants), who were added as defendants after the adjournment of the trial on the 14th January previous.

STREET, J., held, after a perusal of the reporter's notes made at the trial, that it appeared that leave was given to the plaintiff to make all necessary amendments and bring

all necessary parties before the Court, but that no order was made; that the parties who have been added as parties defendants by the plaintiff are not necessary parties, and therefore he must pay their costs.

MARCH 15TH, 1902.

DIVISIONAL COURT.

TAYLOR v. DELANEY.

Appeal—Surrogate Court—Bond—Notice of Appeal.

The plaintiff gave notice that he intended to appeal from the judgment of a Surrogate Court to the Court of Appeal.

Held, a valid notice.

The bond on appeal recited that the plaintiff desired to appeal to the Court of Appeal.

Held, a valid security. Court of Appeal may be read "proper appellate tribunal."

Re Nichol, 1 O. L. R. 213, not applied.

Motion by plaintiff to quash appeal of defendant Delaney on the ground that the notice of appeal from judgment of Surrogate Court of Essex did not state the Court appealed to; and that the recital in the bond was of an appeal to the Court of Appeal.

J. H. Moss, for plaintiff.

F. A. Anglin, for defendant.

The motion was argued before a Divisional Court.

BRITTON, J.—I agree to dismissing the motion without costs.

STREET, J.—I am clearly of opinion that the sureties would be liable on the bond put in if the respondent succeeded. The bond must be interpreted in view of the law as it stood at the time it was executed. There was at the time the bond was made only one Court to which an appeal could be made, viz., a Divisional Court of the High Court, and that may fairly be taken to have been the "Court of Appeal" mentioned in the bond. We decided on the argument that the notice was sufficient.

FALCONBRIDGE, C.J.—By 58 Vict. ch. 13 (The Law Courts Act, 1895), sec. 45, appeals from the Surrogate Court were transferred from the Court of Appeal to a Divisional

Court of the High Court, but no corresponding change was made in the Surrogate Court Rules or forms; and in Mr. Howells's work, 2nd ed. (partly re-written, according to the preface, since the Act), the old forms of bond appear at p. 602. It is a case for relief from the harsh rule in *Re Nichol*, 1 O. L. R. 213. The bond recites that the appellant "desires to appeal to the Court of Appeal," not the Court of Appeal for Ontario, and the words may well be read as equivalent to the "proper appellate tribunal," just as in the original Criminal Code, 1892, the expression "Court of Appeal" in secs. 742 et seq. included any division of the High Court of Justice.

Motion dismissed without costs.

Clarke, Cowan, Bartlett, & Bartlett, Windsor, solicitors for plaintiff.

Murphy, Sale, & O'Connor, Windsor, solicitors for defendant.

LOUNT, J.

MARCH 15TH, 1902.

CHAMBERS.

RE PERRIN.

Will—Legacy—To be Paid to Infant upon his Attaining 25 Years—Interest on.

Originating notice by an executor under Rule 938.

Paragraph 1 of the will of David Perrin, deceased, is as follows:—"I give devise and bequeath unto my beloved wife all my real and personal estate . . . to use enjoy sell dispose of assign and convey as she may see fit;" and 2 is:—"After the decease of my said wife I will and direct that whatever may remain of my said estate whether real or personal shall be equally divided among" six persons, naming them.

Paragraph 2 of the codicil is:—"I revoke the provision made in paragraph 2 of my will in favour of Augustus Sharpe," one of the six persons, "he having departed this life." And:—"Out of the estate mentioned in the said second paragraph of my will I give to Wray Sharpe son of Augustus Sharpe the sum of \$500 to be paid to him without interest after the death of myself and my wife but the same shall not be paid to him until he shall have attained the age of 25 years." His wife predeceased the testator.

A. E. Watts, Brantford, for executor.

W. S. Brewster, K.C., for A. Sharpe, guardian of W. Sharpe.

LOUNT, J.—The testator and wife both being dead, the meaning to be attached is, I give and bequeath \$500 to be paid without interest when Wray Sharpe shall attain 25 years. This would be a payment of the money to him at that time without interest. The testator intended and meant that if he, the testator, died before the legatee reached that age, then the legatee should get the fixed sum of \$500 and no more. I do not think that the testator intended that if he and his wife should die before the time fixed for payment interest should begin to run from the date of his death, or the death of both himself and his wife.

Costs of all parties out of the estate.

MARCH 15TH, 1902.

DIVISIONAL COURT.

LAROSE v. OTTAWA TRUST AND DEPOSIT CO.

Contract—Board and Lodging—Bequest in Lieu of—Lapse.

The testatrix boarded with the plaintiff, and while so boarding made her will containing a bequest to plaintiff's wife. From the time of the making of the will, the plaintiff told testatrix he would not take any board money from her, and did not take any. The plaintiff's wife died before the testatrix, and the legacy lapsed.

Held, that, upon the proper construction of what occurred between the parties at the time deceased ceased to pay her board, the agreement was that no board was to be paid for, provided plaintiff's wife should, at the testatrix's death, become entitled to receive her legacy.

Appeal by defendants from judgment of MACMAHON, J. The defendants are administrators with will annexed to estate of Mary Kelly, deceased. In June, 1893, Mary Kelly went to reside with the plaintiff and his wife, agreeing to pay \$10 a month for her board and lodging. In June, 1895, Mary Kelly by her will bequeathed a legacy of \$2,000 to plaintiff's wife, Catharine Larose, to whom she also bequeathed her residuary estate, amounting to about \$1,800. About the time of the making of the will Mary

Kelly became sick, and thereafter required constant attendance and nursing until her death on 4th June, 1901. After the making of the will Mary Kelly ceased to pay the \$10 a month for her board and lodging. Catharine Larose predeceased Mary Kelly, dying on the 1st June, 1901, and her legacy lapsed. The plaintiff claims \$2,190, being one dollar a day for board, care, and attendance on Mary Kelly for 6 years previous to her death. The trial Judge held that the plaintiff had not been relying on bounty, and that under the circumstances the proper remuneration was at least the amount claimed.

The appeal was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J.)

A. B. Aylesworth, K.C., for defendants.

M. J. Gorman, Ottawa, for plaintiff.

STREET, J.—It appears from the evidence that when the plaintiff became aware of the fact that the deceased had by her will left a legacy of \$2,000 to his wife, besides making her her residuary legatee, and a legacy of \$1,000 to his daughter, he told her, in effect, that he would no longer accept pay from her for her board at his house, and that she must consider it her home for the rest of her life. I do not think it necessary to carefully scrutinize the plaintiff's statement of the precise language he used in conveying to Mrs. Kelly his meaning, for the meaning that he intended to convey is plain, and his recollection of the precise words in which he conveyed it could hardly be relied upon after the lapse of some six or seven years. A contract of some sort was entered into by reason of the fact that both parties must be taken to have acted from that time forward upon the understanding then arrived at. . . . The question is whether the contract was that no money should be charged for board, provided Mrs. Kelly did not alter her will, or whether it must be taken to have been that no money should be charged, provided Mrs. Larose should at Mrs. Kelly's death become entitled to receive the legacy and other benefits bequeathed to her. The latter is the proper construction of the understanding. . . . If Mrs. Kelly had by her own act revoked her will, he would not have been bound to continue to keep her without being paid. The allowance found by the learned Judge below, though liberal, is based on the uncontradicted evidence of Dr. Chabot, who attended Mrs. Kelly during the whole period covered by it.

FALCONBRIDGE, C.J.—From the uncontradicted evidence it is manifest that it was understood by the parties that compensation for deceased's board and attendance should be made by will, and the compensation so to be made by will and not the making of the will formed the consideration for the boarding and care of deceased for the remainder of her life. Having regard to Dr. Chabot's evidence, the amount allowed is not too much.

Appeal dismissed with costs.

M. J. Gorman, Ottawa, solicitor for plaintiff.

Scott, Scott, Curle, & Gleeson, Ottawa, solicitors for defendants.

MARCH 12TH, 1902.

C.-A.

WEST v. BENJAMIN.

Partnership—Settlement—Accounting.

Appeal by plaintiff from order of MEREDITH, C.J., upon appeals by plaintiff and also defendant from a report of the Master at Napanee upon a reference directed by the Supreme Court of Canada to take partnership accounts between the parties from and inclusive of the 1st day of January, 1882, to the dissolution of the partnership, and including in such account all the rights and liabilities, assets and effects, belonging to the partnership, as they existed on the 1st day of January, 1882, and the dealings with such property since the dissolution. The judgment of the Supreme Court recited and confirmed a settlement arrived at on February 4th, 1882.

A. B. Aylesworth, K.C., and J. H. Madden, Napanee, for plaintiff. Pursuant to the judgment the report should have allowed as an asset of the partnership on January 1st, 1882, a sum of \$4,751, the amount of sundry private accounts of defendant, for which he had given partnership goods in payment and not been charged with their price, and also a sum of \$2,063.03 credited as paid by defendant for partnership debts, but paid for by delivery of partnership goods, not charged to him, and both these sums could be properly taken into account without disturbing the figures of matters agreed upon by the settlement of February 1st, 1882. The Master's finding that defendant had at the time of the settlement \$4,000 worth of unpaid promissory notes in his hands and

unaccounted for, and which the Chief Justice reduced by \$3,000, should not be disturbed.

W. R. Riddell, K.C., and C. A. Masten, for defendant, also appealed from the order. The \$3,000 allowed by the Master against defendant, and the \$1,000 known as the German note should not be allowed.

The Court, composed of OSLER and MACLENNAN, JJ.A., (LISTER, J.A., having died after the argument and before judgment) allowed the appeal as to promissory notes and dismissed it as to items of \$4,751 and \$2,063.03. Plaintiff to have three-quarters of the costs of his appeal. The cross-appeal was dismissed with costs and judgment in other respects affirmed. It was stated that LISTER, J.A., had come to a similar conclusion.

Deroche & Madden, Napanee, solicitors for plaintiff.

Herrington & Warner, Napanee, solicitors for defendant.

BRITTON, J.

MARCH 10TH, 1902.

CHAMBERS

GEARING v. MCGEE.

Pleading—Amendment—Attaching Order—Defence of.

The plaintiff in a former action sued the defendants and one Robinson to enforce a mechanic's lien (see 27 A. R. 364). The plaintiff's action was dismissed as against the owners, the McGees, but his lien was declared against the interests of the Robinsons in the property. In the former action the McGees gave an indemnity to the Robinsons to protect them against liens. This indemnity was subsequently assigned to the plaintiff Gearing, who now brings this action upon it. After judgment in the former action and taxation of costs against Gearing, the McGees obtained a garnishment order attaching all moneys in the hands of Robinson and others, of Gearing, to answer the costs due the McGees by Gearing. In this action by Gearing upon the indemnity thus assigned to him, the Master in Chambers gave the defendants the McGees liberty to set up, as a defence, the above garnishment-order.

The plaintiff appealed.

J. E. Jones, for plaintiff.

W. N. Ferguson, for defendant.

BRITTON, J.—Appeal by plaintiff from so much of the order of the Master in Chambers as allows defendants to amend their defence by pleading an attaching order against Robinson and others, obtained by the defendants as judgment creditors in an action against the plaintiff in which defendants recovered judgment. That judgment is in favour of defendants against the plaintiff for \$471.59. This amount, with interest, or any part of it, the plaintiff is willing to allow against corresponding amount he may be entitled to in this action. The defendants say that, in addition to the \$471.59 and interest, which plaintiff in his claim admits and is willing to set off, they are entitled to subsequent costs; if so, the defendants, in the event of plaintiff's recovery herein, should be entitled to set these off; and no doubt an order would be made upon application for that purpose, if plaintiff objected. The only possible object of pleading the attaching order would be to let in evidence of the state of account between plaintiff and Robinson and others, for the purpose of attempting, in that way, to get the alleged subsequent costs of defendants upon their judgment against plaintiff, a part of which costs is for an appeal from the taxation. I am of opinion that the amendment should not be allowed. To plead this attaching order would further complicate a matter already a good deal involved. It is not a plea that can help defendants, but will embarrass the plaintiff. It does not in any way go to the merits or assist in determining the real matters in controversy between the parties.

Appeal allowed. Costs to plaintiff in any event.

DuVernet & Jones, Toronto, solicitors for plaintiff.

Millar, Ferguson, & Hughes, Toronto, solicitors for defendants.

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VOL. I.

TORONTO, MARCH 27, 1902

NO. 11.

MEREDITH, J.

MARCH 12TH, 1902.

TRIAL.

McLELLAN v. HOOEY.

*Assessment and Taxes — Sale for Taxes — Description of Land—
Sufficiency of — Possession — Adverse after-acquired Rights of
Entry—R. S. O. ch. 224, sec. 211.*

Action by plaintiff, claiming under a registered paper title, to recover possession of certain lots of land in the town of Trenton, and to set aside a tax deed made to defendant, and for other relief. The plaintiff derived his registered title after the sale for taxes to defendant. The lots were advertised for sale on 23rd September, 1896, for arrears of taxes for the years 1892-3-4, and the sale was adjourned to 7th October, 1896, at which time the corporation purchased, and in May, 1899, assigned the certificates to defendant, who went into possession of the lots, which had hitherto been vacant, and made improvements to the value of \$650.

A. Abbott, for plaintiff.

W. C. Mikel, for defendant. The fact that there are only two lots, 7 and 8, discloses only a latent ambiguity, and evidence may be given to shew that the lots sold were the lots bought by the defendant and in his possession. The tax sale is valid under 57 Vict. ch. 85 and 61 Vict. ch. 56. Moreover, the assignment of mortgage under which plaintiff claims is dated 17th September, 1900, and the conveyance to him is dated 1st August, 1900, both after the entry into possession of defendant; and therefore under sec. 211 of the Assessment Act defendant must succeed.

F. Britton Osler appeared for town of Trenton, though not parties.

MEREDITH, J.—The lands were generally described as lots 5, 6, 7, and 8 on the east side of McLellan avenue, in the town of Trenton. There happen to be two other lots on the east side of McLellan avenue also numbered 7 and 8, and it was urged that as to those two lots, at all events, there was such uncertainty as to avoid the sale; that the

lots in question ought to have been described as in the Irvine survey, the other lots 7 and 8 being in what is called the Jubilee survey. There was no other lot 5 or 6 on the east side of the avenue, and throughout the proceedings the four lots in question were grouped together with an adjoining lot, 4, fronting upon another street; and the only testimony given upon the question of identity was that of plaintiff's witness, the town engineer, who said, in effect, that the grouping of the lots removed any doubt as to their identity, any ambiguity or uncertainty as to lots 7 and 8; and, besides this; in some of the proceedings the lots were otherwise distinguished so as to remove any excuse for doubt, real or assumed, as to their identity.

Apart from all this, no one concerned has been misled . . . and the taxes have been properly imposed, and the proper person had notice of assessment and intention to sell. . . . The plaintiff obtained his title while the defendant was in occupation under his tax title, and it was contended for defendant that, by reason of sec. 211 of the Assessment Act, the plaintiff could not succeed, but the same question probably arises here as that already dealt with, for if the assessment and sale proceedings be void for uncertainty as to the lands, it can hardly be said to be a case "where lands are sold for arrears of taxes." And so too probably as to the defence, based upon 61 Vict. ch. 56 (O.) But I find that the proceedings were not invalid by reason of the description of the lands, and that it was sufficient in this case for the purposes of the taxation, and sale in question: see *Hyatt v. Mills*, 19 A. R. 329; Assessment Act, secs. 13 (1) (c), (4), columns 8 and 9, secs. 29, 34, 51, and schedule D., sec. 74, sub-sec. 2, and secs. 152-5, 162, 173, 177, 193, 203, 207, and 212.

Action dismissed with costs.

A. Abbott, Trenton, solicitor for plaintiff.

W. C. Mikel, Belleville, solicitor for defendant.

BRITTON, J.

MARCH 17TH, 1902.

TRIAL.

TORONTO JUNCTION PUBLIC SCHOOL BOARD v. COUNTY OF YORK.

*Public Schools—Model School—Support of—Contribution by County
—School in a Separated Town Territorially within County.*

Action brought for a declaration that defendants are liable under the provisions of the Public Schools Act to

contribute towards the support of the South York County Model School, situated at the town of Toronto Junction.

W.E. Raney, for plaintiffs.

C. C. Robinson, for defendants.

BRITTON, J.—The plaintiffs are entitled to the declaration as prayed. Toronto Junction is territorially within the limits of the county of York, but it is a separate town, within the provisions of the Municipal Act, and as a municipality is not under the jurisdiction of the county council. Is Toronto Junction part of the county of York, within the meaning of secs. 83 and 84 of 1 Ewd. VII. ch. 39, for educational purposes? That is to say, for the purpose of compelling the county of York to contribute to the maintenance of its model school, set apart by the board of examiners as one of the model schools of the county. The county board of examiners is a board appointed by the municipal council of the county. That board must have as one of its members the inspector of any town (within the county) separated from the county. That board has jurisdiction within the county as to the subjects (limited in number) with which it can deal. The board can set apart at least one public school in the county as a model school for the training of teachers. Such a school could be established by the board in a town (within the county), although separated municipally from the county. If the board could do this now, it follows that this model school in Toronto Junction, properly set apart as a county model school, continues such, notwithstanding the separation of the town municipally from the rest of the county. The word "county," in the Act, sometimes must be applied territorially and sometimes municipally. In this case the model school is a county school, although in the separated town. Judgment for plaintiffs with High Court costs.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for plaintiffs.

C. C. Robinson, Toronto, solicitor for defendants.

LOUNT, J.

MARCH 18TH, 1902.

CHAMBERS.

RE ANDERSON.

Will—Direction to Pay Debts out of Estate—Specific Devise of Personality—Residuary Devise of Money and Securities for Money—Debts Payable out of Money.

Originating notice, heard at London, by executors of John Anderson, deceased, for a direction as to the fund

out of which the testator's debts, amounting to \$1,143, are to be paid.

M. P. McDonagh, London, for executors and for Ellen Needham.

R. G. Fisher, London, for Margaret Ardel.

F. P. Betts, London, for J. H. Needham, an infant.

LOUNT, J.—The estate is valued at \$27,000. The personal property, household furniture, goods, chattels, and effects, excepting money and securities for money, are of the value of \$1,200. The money amounts to \$5,880, and securities for money are of the value of \$3,050. By clause 1 of the will, provision is made by the testator for the payment of his just debts, funeral and testamentary expenses, by his executors, out of the estate, as soon as convenient after his decease. Other clauses contained devises of his real estate in different parcels to his grandson, John Hamilton Needham, the infant, to Margaret Ardel and Ellen Needham, his daughters. By clause 6 of his will, he gave and bequeathed all his "personal property, household furniture, goods, chattels, and effects to my grandson, John Hamilton Needham, excepting the money and securities for money of which I die possessed," and by clause 7 he directed that "the money and securities for money of which I die possessed be divided" among his daughters and grandson in certain proportions. I think that the debts must be paid out of the money and securities for money bequeathed in clause 7. The money in hand is the proper fund to which resort should be had for the payment of debts, and in this case there is sufficient for the purpose. Clause 7 is a residuary clause, but clause 6 is of a specific legacy, and not to be resorted to for the payment of debts as long as there are sufficient funds for that purpose under clause 7.

Order accordingly. Costs of all parties out of fund mentioned in clause 7.

MEREDITH, J.

MARCH 19TH, 1902.

CHAMBERS.

NESBIT v. GALNA.

Security for Costs—Residence of Plaintiff out of Ontario—Return—Ordinary Residence—Rules 1198 (b), 1199.

An appeal by the plaintiff from an order of the local Master at Sarnia dismissing an application by the plaintiff to set aside a præcipe order for security for costs.

The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in

the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on *præcipe*, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario.

D. L. McCarthy, for plaintiff.

J. D. Falconbridge, for defendants.

MEREDITH, J.—The order was rightly made, not only under Rule 1199, but also because plaintiff actually resided out of Ontario at the time. After his marriage, his residence was at his wife's home, in Michigan. As to the question whether, if the plaintiff now really resides in Ontario and intends to reside therein, that circumstance is sufficient to relieve him from the order: at law it ordinarily would not, especially if security had been given: *Badnall v. Haylay*, 4 M. & W. 535; *Westenberg v. Mortimore*, L. R. 10 C. P. 438; *Hatley v. Merchants' Despatch Co.*, 12 A. R. 640; but in equity it would: *O'Conner v. Sierra Nevada Co.*, 24 Beav. 435; *Mathews v. Chichester*, 30 Beav. 135; *Harvey v. Smith*, 1 Ch. Chamb. 392. No case, however, seems to lay down any clear and positive rule upon the subject. . . .

The plaintiff being a British subject, always a resident of Ontario until his second marriage about six years ago, and even during that time frequently sojourning and doing business in Ontario, and security not having been given, but a *præcipe* order only obtained, I should feel authorized in relieving him from that order, if quite satisfied that he is now actually, and intends to continue, a resident of Ontario: see *Place v. Campbell*, 6 D. & L. 113. . . . But, upon the evidence, I look upon the wife's home in Michigan as really the place of residence of herself and the plaintiff, and likely so to remain: see *Marsh v. Beard*, 1 Ch. Chamb. 390; *Watson v. Yorston*, 1 U. C. L. J. N. S. 97.

The local Master has found that the plaintiff's ordinary place of residence is at his wife's home, and that his residence in Ontario, boarding at an hotel, though for months past, is merely a temporary residence. I have not disagreed with him in that finding; the burden of proof was upon the

plaintiff. Rule 1198 (b) therefore applies, and the case is one in which an order for security for costs ought to be made, and nothing would be gained by setting aside the præcipe order and making another order to the same effect.

Appeal dismissed: costs in cause to defendants.

Hanna & McCarthy, Sarnia, solicitors for plaintiff.

W. L. Haight, Parry Sound, solicitor for defendant.

LOUNT, J.

MARCH 20TH, 1902.

CHAMBERS.

RE FITZSIMMONS.

Will—Death without Issue—Executory Devise—Power of Sale—Executors—Executors of Executor—Rule of Construction.

Originating notice under Rule 938 by executors of R. Ferguson, deceased, the last surviving executor of R. Fitzsimmons, deceased. R. Fitzsimmons died in 1845, leaving surviving, his wife Elizabeth, and one child Mary Ann. The will provided as follows:—"Firstly, I give and bequeath my real estate . . . containing 50 acres to the sole and proper use of my wife Elizabeth and my child Mary Ann in the following manner and on these express conditions, viz.:—My said wife is to have, possess, and enjoy all my said real estate, subject to the payment of all my just and lawful debts, for the support of herself and my child as long as she remain my widow, and in the event of her marrying after my decease, it is my will that all my real estate aforesaid should to all intents and purposes become the sole property of my said child Mary Ann and her heirs after her, and in case of the above event my will is that the place might be leased by my executors, and the proceeds solely appropriated to the support of my said child, and in the event of my said child Mary Ann dying without issue, it is my will and desire that my said real estate should be sold, and the proceeds equally divided between the children of my brother James, and also between the children of my sister Margaret, that is, to be equally divided between the children of my said brother and sister respectively. I hereby appoint Robert Ferguson and Keiran Kelly to be my sole executors, to carry the above into effect." The widow remained unmarried, and died in 1897. The daughter died unmarried in 1900.

W. Davidson, for petitioners.

J. Hales, for executors of Mary Ann Fitzsimmons.

W. I. Dick, Milton, for Robert Murphy, representing a class.

LOUNT, J.—“A will should be construed by reading it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument should follow from so reading it:” per Lord Wensleydale in *Abbott v. Mitchell*, 7 H. L. Cas. 877. “It is not the duty of a court of justice to search for a testator’s meaning otherwise than by fairly interpreting the words he has used:” per Lord Cranworth in the same case. See also *Crawford v. Broddy*, 26 S. C. R. at p. 353. Adopting this rule of construction, and reading the will in the ordinary and grammatical sense, it appears to me that Elizabeth Fitzsimmons, the widow of the testator, took an estate for life, subject to being cut down to an estate terminable on her marrying again, and subject to the express conditions of the payment of his debts, and to the support of his child Mary Ann, and as long as she remained his widow, but if she married again, her estate would absolutely cease; otherwise an estate for life, if she remained unmarried. His child Mary Ann, by the words “I give and bequeath my real estate to the sole and proper use of my child Mary Ann,” took an estate in fee simple, subject to an executory devise over in the event of her dying without issue, by the words, “in the event of my child dying without issue it is my will that my real estate should be sold and the proceeds equally divided between the children of my brother and sister.” I think these words import a failure of issue restricted to the time of the death of the first devisee: *Ex p. Davis*, 2 Sim. N. S. 114; *Coltsman v. Coltsman*, L. R. 3 H. L. 121; *Gray v. Rochford*, 2 S. C. R. 431; *Jarman on Wills*, 5th ed., 1332. The rule is well established of restrictive construction for cases in which the devise is to A. in fee, and if he dies without issue, then at his death, over. . . . I think, also, it must be held that the intention of the testator was that, whether the estate reached Mary Ann through one channel or the other, he intended and willed that if she died without issue, then there should be the executory gift over, the lands should be sold and the proceeds go to the children of his brother and sister as mentioned in the will. By giving to the will this construction full meaning is attached to all of it, with the result that the manifest intention of the testator is effectuated without repugnance or inconsistency. This being so, the executors of the deceased surviving executor of this testator have power to sell and distribute the proceeds among the children of his brother and sister. The will does not clothe the executors directly with authority to sell, but directs a sale, and his executors are “to be his sole executors to carry the

above into effect." This would be sufficient authority for the executors if either were alive; what either of them, if living, could do, the executor of the survivor can do: Williams on Executors, 9th ed., 204. See also *Re Stephenson*, *Kinnee v. Malloy*, 24 O. R. 395.

Declare, therefore, that Mary Ann took an estate in fee simple subject to an executory devise over if she died without issue, whereby the executors of Robert Fitzsimmons were empowered to sell and distribute the proceeds among the children of the testator's brother and sister, and that the executors of the surviving executor have power to sell. Costs of all parties out of the estate

G. E. McCraney, Milton, solicitor for petitioners.

W. I. Dick, Milton, solicitor for R. Murphy.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for executors of Mary Ann Fitzsimmons.

MEREDITH, J.

MARCH 21ST, 1902.

CHAMBERS.

HENRY v. WARD.

Arrest—Intent to Quit Ontario with Intent to Defraud—Foreigner.

Motion by defendant for his discharge from custody under an order for his arrest made upon the plaintiffs' application by the Judge of the County Court of Essex. The defendant was never a resident of Ontario, but was a citizen of the United States of America, and a resident of and a large property owner in the State of Michigan.

J. H. Moss, for defendant.

J. M. Clark, K.C., for plaintiffs.

MEREDITH, J.—If the truth and the whole truth had been told upon the ex parte application for the order, it could not rightly have been made: see *Cozens v. Richer*, *Dra.* 167; *Fryer v. Hislop*, 1 *Ex.* 437; *Bowers v. Flower*, 3 *P. R.* 62. The defendant must now be discharged from custody, because he was not at the time the order was obtained about to quit Ontario at all, and because, upon the whole evidence brought out upon this motion, the defendant did not then intend to defraud his creditors generally or the plaintiffs in particular, by quitting Ontario.

Order made for discharge of defendant with costs.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant.

J. W. Hanna, Windsor, solicitor for plaintiffs.

WINCHESTER, Master.

MARCH 6TH, 1902.

ROBERTSON, J.

MARCH 19TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Quo Warranto—Notice of Motion for Tuesday 24th February, by Mistake for Tuesday 25th February, Valid—Amendment.

This was an application for an order to unseat the respondents, who had been elected aldermen of the city of St. Thomas.

On the 6th February, 1902, the relator, upon filing his affidavit and the affidavits of two others, etc., obtained a fiat to serve the notice of motion—upon his filing a sufficient recognizance as provided by the Municipal Act, R. S. O. 1897 ch. 223, sec. 220—for an order setting aside and declaring invalid and void the election or pretended election held on the 6th February, 1902, at the city of St. Thomas, under which election the respondents—eleven in all—had unjustly usurped the office of alderman in and for the city of St. Thomas.

Before serving the notice of motion, the relator's solicitor filled in the date upon which it was returnable as "Tuesday the 24th day of February, A.D. 1902." This notice of motion was served upon the respondents on the 15th February, 1902, and shortly thereafter it was discovered that a mistake had been made in describing the date as "Tuesday the 24th day of February," instead of "Tuesday the 25th day of February;" and on the 18th February a notice entitled in this matter and reading as follows:—"Take notice, that by a clerical error in the notice of motion served on you herein, it is stated that a motion will be made before the said Master in Chambers at Osgoode Hall in the city of Toronto, at eleven o'clock in the forenoon, on Tuesday the 24th day of February, 1902, instead of Tuesday the 25th day of February, 1902; and you are hereby notified that the day on which the said motion will be made is Tuesday the 25th day of February, A.D. 1902:"—was served upon a number of the respondents by the relator; and the remainder were served with same on the 20th, 21st, and 22nd days of February. This notice was signed by the relator John West Roberts, by his solicitor.

J. H. Moss, for the relator.

E. E. A. DuVernet, for the respondents.

THE MASTER IN CHAMBERS, after referring to *Batten v. Harrison*, 3 Bos. & Pull. 1. and *Eldon v. Haig*, 1 Chit. 11, held the notice valid for 25th February, and continued as follows:—

It was further argued by counsel for the respondents that there was no provision in the statute giving any

authority to amend the notice of motion or enlarging the time.

R. S. O. 1897 ch. 223, sec. 220 (4), seems to me, however, to give all the power that is given under the Consolidated Rules of Practice under the Judicature Act to the proceedings under that Act.

It says: "Where the proceedings are taken before a Judge of the High Court or before the Master in Chambers . . . the same shall be entitled and conducted in the High Court of Justice in the same manner as other proceedings in Chambers."

From 1888 to 1897, the provisions of this statute—secs. 220 (1) and (2) to 236, inclusive—formed a portion of the Consolidated Rules of Practice under the Judicature Act, but they were in 1897 consolidated in the Municipal Act with the addition of 220 (4) and one or two other subsections, thus indicating that the practice in High Court matters was intended to be still made applicable to such applications.

Even before the sections relating to controverted municipal elections had been consolidated in the Rules of Practice, it was held that the Rules of Practice applied.

There are a number of cases shewing this.

In Reg. ex rel. Linton v. Jackson, 2 Ch. Ch. 18, and in Reg. ex rel. McManus v. Ferguson, 2 C. L. J. N. S. 19, it was held that proceedings in these *quo warranto* matters were not to be held irregular and void which do not interfere with the just trial of the matter on the merits. See also Reg. ex rel. Grant v. Coleman, 7 A. R. 619, at p. 625.

I would also refer to cases of irregularity in giving notice of trial where the statute required a certain notice to be given, but where the irregularity was not allowed as sufficient to set aside the notice: see Holmsted & Langton, 704.

I hold, therefore, that the notice of motion given herein, under the circumstances set forth, is good and sufficient notice for Tuesday the 25th February, 1902, and that the sureties can have no ground of objection because of the proceedings not being properly prosecuted.

The order for examination of witnesses will issue—to be spoken to as to the examiner.

An appeal by the respondents from this order was argued by the same counsel in Chambers before

ROBERTSON, J. who held that the notice for the 25th February was good for the reasons given by the Master.

McEvoy & Perrin, London, solicitors for the relator.

McLean & Cameron, St. Thomas, solicitors for the respondents.

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NO. 12.

MEREDITH, J.

MARCH 21ST, 1902.

CHAMBERS.

RE GREENWOOD v. BUSTER.

County Court—Jurisdiction—Consent does not Give—Prohibition.

Motion for prohibition to the Judge and clerk of the County Court of Frontenac and the defendant in action in that Court, to prohibit them from enforcing a pretended judgment pronounced in 1893 by Richard T. Walkem, one of Her late Majesty's counsel, sitting as County Court Judge, at the request of the Judge, who was ill, but without the authority of a commission as deputy-judge or otherwise, dismissing the action with costs upon a regular trial, after the plaintiff had consented to a trial by Mr. Walkem. The plaintiff moved before the Judge of the Court to set aside the nonsuit, and the motion was dismissed with costs. The defendant taxed the costs under the judgment, and had execution in the sheriff's hands ever since. Recently an alias writ had been placed in the sheriff's hands, and a seizure of the plaintiff's goods was threatened.

D. L. McCarthy, for plaintiff.

T. D. Delamere, K.C., for defendant. The plaintiff is estopped from taking advantage of the irregularity: Mayor of London v. Cox, L. R. 2 H. L. 239; Archibald v. Bushey, 7 P. R. 304; Robertson v. Cornwell, *ib.* 297; Shortt on Mandamus and Prohibition, p. 445.

MEREDITH, J.—There was a total want of jurisdiction, and consent could not confer jurisdiction. Delay could make no difference. Rose, J. (29th Nov., 1895), in a similar case of Re Innes v. Gates, tried before Mr. Walkem, granted prohibition; see also Deadman v. Agriculture and Arts Association, 6 P. R. 176.

The order will go, but without costs.

WINCHESTER, MASTER.

MARCH 24TH, 1902.

CHAMBERS.

DOMINION PAVING AND CONTRACTING CO. v.
MAGANN.*Summary Judgment—Payment into Court of Amount Admitted to be Due—Payment out to Plaintiffs—Without Prejudice to Defendant's Rights.*

Kane v. Mitchell, 13 P. R. 118, referred to.

Action for return of moneys overpaid to defendant on an account. The defendant, upon being served with the writ of summons, paid \$1,081.66 into Court, under Rule 419, in full satisfaction of plaintiffs' claim. The plaintiffs moved for judgment under Rule 603 for the amount claimed by the writ. The defendant, in an affidavit, admitted the claim to the extent of the amount paid into Court, but disputed the balance.

G. H. Kilmer, for plaintiffs.

J. D. Falconbridge, for defendant.

THE MASTER IN CHAMBERS:—Plaintiffs' counsel asks for judgment for the amount paid into Court. I do not think the plaintiffs entitled to judgment as asked. The Rules under which the defendant has paid what he admits to be due give the defendant some benefits that would be useless if judgment were given for plaintiffs as asked. I think justice will be done to the parties by directing the amount in Court to be paid out to plaintiffs, the defendant admitting same to be due to the plaintiffs in his affidavit. This payment will be without prejudice to whatever rights the defendant may be entitled by reason of his paying same into Court under the Rules. I would refer to the opinion of the late Master in Chambers in Kane v. Mitchell, 13 P. R. 118. Costs in the cause.

Kilmer, Irving, & Porter, Toronto, solicitors for plaintiffs.

Johnston & Falconbridge, Toronto, solicitors for defendant.

MACMAHON, J.

MARCH 24TH, 1902.

TRIAL.

MCCALLAM v. SUN SAVINGS AND LOAN CO.

Company — Shares — Subscription — Misrepresentation — Agent — Settlement Pending Action, Induced by Threats, Set Aside.

Action for the cancellation of the application for 1 share of permanent stock of the defendant company, signed by the plaintiff Margaret McCallam, and of the certificate

and the repayment of the \$100 paid by her therefor, and the cancellation of the application for 10 shares of said stock, signed by the plaintiff Samuel McCallam, and the repayment of \$80 paid by him on account thereof, and by amendment, to set aside an agreement of settlement made after the commencement of the action.

C. D. Scott, for plaintiffs.

H. H. Dewart, K.C., for defendants.

MACMAHON, J.—Dealing first with the question of the alleged settlement of this action. Without imputing to Mr. Henderson anything else than forgetfulness of what took place on that occasion, he, no doubt with the desire to bring about what he says he considered a fair settlement, then told S. McCallam that unless a settlement was effected that night it could not be settled at all, and if not settled that night he (Henderson) would bring an action to recover \$5,000 damage for slander alleged to have been uttered by McCallam on his examination for discovery, and that defendants would keep it in litigation for years. When McCallam urged that the case should be submitted to his solicitor, Henderson made the above threat. This threat was the inducing cause of McCallam's signing the offer of settlement, and he says he signed under fear of the prosecution. Under the circumstances it is a settlement amounting to coercion not persuasion: *Ellis v. Barker*, 25 L. T. N. S. 7; *Jackson v. G. T. R. Co.*, 25 O. R. 64-66. The agreement, however, is only an offer, and did not become an agreement until assented to by defendants, and plaintiffs' solicitors repudiated the settlement and withdrew the offer the same day. The manager of the defendants agreed to the settlement on the day after it was made, the 7th January, 1902, the president on the 8th January, and the board on the 20th January. The assent of the board was too late, but it does not matter owing to the coercion adopted. . . . I find that Mr. Henderson stated that the Imperial Trust Company was behind defendants, and had guaranteed a dividend of six per cent. upon the stock subscribed for, and that through the trust company the plaintiffs could get the amount of their principal at any time. These statements were untrue. The plaintiff S. McCallam is, therefore, entitled to have his application for 10 shares of defendants' stock cancelled and to a refund of the \$100 he has paid thereon, and his wife, the co-plaintiff, though she has received dividends on her 1 share, for which she paid in full, is, as she is in a position to return the stock, entitled to do so and receive back her money: *Clarke v. Dickson*, E. B. & E. 148.

The defendants must pay the plaintiffs their costs.

Scott & Scott, Toronto, solicitors for plaintiffs.

Dewart, Young, & Maw, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J.

MARCH 25TH, 1902.

TRIAL.

CLARK v. WALSH.

Sale of Mining Land—Agreement to Incorporate Company to "Handle and Acquire"—Specific Performance—Foreign Incorporation—Amendment.

Action for specific performance of an agreement dated 16th November, 1900, whereby plaintiff Clark undertook to deposit the sum of \$2,000, part of the consideration, to credit of defendant in the Ontario Bank at Port Arthur, on the 1st January, 1901, and by said date incorporate a company with a capital of \$500,000 in fully paid shares, to handle and acquire certain mining locations near Sapome Lake, Rainy River District, belonging to defendant, and to assign to her 100,000 fully paid shares, and to do certain work in developing the property. After the agreement the defendant's husband, J. J. Walsh, contracted with plaintiff Clark to and did sink a shaft, and then assigned his claim for the work done, to the defendant, who counter-claimed for its value. At the trial the plaintiffs asked leave to amend by alleging, *inter alia*, that it was agreed and understood that foreign incorporation was to be obtained.

A. B. Aylesworth, K.C., and N. W. Rowell, for plaintiff.
R. C. Clute, K.C., for defendant.

FALCONBRIDGE, C.J.:—The incorporation in the State of West Virginia of a company having its principal office or place of business at Buffalo, U.S., with the enormous powers and purposes set out in the agreement and certificate of incorporation, was not in numerous material respects the company "to be incorporated to handle and acquire the property," within the meaning of the memorandum of agreement of the 16th November, even if plaintiff were entitled to any variation or modification of that agreement by reason of any contemporaneous verbal discussions on the subject. And this West Virginia company, whose corporators live in Massachusetts and New York, did not obtain a license authorizing it to carry on business in this Province until 11th June. Moreover, the dealing with and manipulations of the stock were not at all of such a character as to convey the idea that defendant's \$100,000 thereof would be of any value to her. Action will therefore be dismissed and the proposed amendment to the statement of claim not allowed.

Defendant does not insist on retaining the whole of the \$2,000, but only so much thereof as is sufficient to satisfy J. J. Walsh's claim, assigned to her, and her costs. This she is entitled to do, apart from the question of defendant's right to sue plaintiffs for the cause of action so assigned. There will therefore be judgment for defendant on the counterclaim for \$975 and costs. Plaintiffs will be entitled to the balance of the \$2,000 after deduction of \$975 and defendant's costs of action and counterclaim.

T. A. Gorhan, Port Arthur, solicitor for plaintiffs.

W. McBrady, Port Arthur, solicitor for defendant.

FALCONBRIDGE, C.J.

MARCH 25TH, 1902.

TRIAL.

DAVIS v. RIDEAU LAKE NAVIGATION CO.

Principal and Agent—Liability of Company—Holding out of Person as General Manager—Costs.

Action to recover \$1,217.42, balance due plaintiffs in respect of rebuilding and repairing steamer "James Swift," and repairs to steamer "Rideau Queen;" tried at Kingston.

E. H. Smythe, K.C., for plaintiffs.

J. L. Whiting, K.C., for defendants.

FALCONBRIDGE, C.J.—Notwithstanding the alleged holding out of defendant Noonan as general manager of defendant company, there are too many elements of notice to plaintiffs to look to Noonan for payment, and of election of plaintiffs so to do, to entitle them to recover against the company. The company and Noonan defended by the same solicitor, and there are other good reasons why in dismissing plaintiffs' action as against the company costs should not also be imposed on plaintiffs.

Judgment granted against defendant Noonan for \$1,217.04, and interest from 17th October, 1901, and costs. Plaintiffs to credit \$15.50 paid into Court by defendant company. Action, as against defendant company, dismissed without costs.

Smythe & Lyon, Kingston, solicitors for plaintiffs.

J. L. Whiting, Kingston, solicitor for defendants.

BOYD, C.

MARCH 26TH, 1902.

WEEKLY COURT.

CENTAUR CYCLE CO. v. HILL.

Sale of Goods—Action for Price—Counterclaim for Damages—Report of Referee—Varying on Appeal—Further Directions—Costs.

An appeal by the plaintiffs and cross-appeals by each of the defendants from the report of James S. Cartwright, an

official referee, upon the trial by him of an action for the price of bicycles sold and a counterclaim for damages in respect of the quality of the bicycles. Also a motion by plaintiffs for judgment on the report.

G. F. Shepley, K.C., and N. W. Rowell, for plaintiffs.

E. B. Ryckman and C. W. Kerr, for defendant company and defendant Hill.

G. G. Mills, for defendant Love.

THE CHANCELLOR dealt with the facts of the case at considerable length, and varied the report of the referee in some particulars. He also pronounced judgment in accordance with the report as varied, and upon the question of costs.

FALCONBRIDGE, C.J.

MARCH 26TH, 1902.

TRIAL.

MANN v. G. T. R. CO.

Deed—Construction—Gravel—Subsequent Deposit.

Action tried at Cayuga, brought for damages for conversion by defendants of a quantity of gravel taken by defendants from certain lands of the plaintiffs. This was the second trial of the action. The facts appear in the reports of the decision upon previous trial, 32 O. R. 240, and in appeal, 1 O. L. R. 487.

J. H. Moss, for plaintiffs.

H. S. Osler, for defendants.

FALCONBRIDGE, C.J.—The questions of law have been settled for me on the former trial and appeal. I find the issues joined in favour of the plaintiffs, and assess the damages at \$350, with costs on the High Court scale, and grant an injunction restraining defendants from further interfering with the deposit of gravel.

W. D. Swayze, Dunnville, solicitor for plaintiffs.

Bell & Biggar, Belleville, solicitors for defendants.

FALCONBRIDGE, C.J.

MARCH 27TH, 1902.

CHAMBERS.

RE McALLISTER.

Will—Construction—Estate Tail.

Originating notice under Rule 938.

By his will, dated in 1872, Robert McAllister, who died in 1876, devised certain land to the applicant, A. R. Chatterton, in the following terms:—"I give and bequeath unto

my beloved grandson Almanzer Robert Chatterson all that certain tract or parcel of land lying and being lot 3 in the second range of the township of Brantford, together with twenty-one acres, more or less, being rear part of number 2, conveyed to me by Daniel McDermid and his wife Margaret McDermid by deed bearing date the 15th of July 1847, whereon I now live, with all the appurtenances thereunto belonging, for and during his natural life, his heirs (if any) to inherit according to the present primogeniture law of Canada. If my said grandson should die without heirs of his body, then the aforementioned lands shall be divided between my beloved granddaughter Arrinthea Chatterson and the wife of Almanzer Chatterson if he should be married."

J. E. Jones, for executor and for applicant. The words "according to the present primogeniture law of Canada," may be rejected as having no meaning since 1852. The use of the words "without heirs of his body" excludes sec. 32 of the Wills Act, which defines the words "die without issue," because they are apt words to create an estate tail: Jarman on Wills, 5th ed., 1322; Harris v. Davis, 1 Coll. 416. The death was in 1876, and the will was made in 1872, and therefore sec. 32 does not apply in any case.

FALCONBRIDGE, C.J., held that the grandson took an estate tail.

Kelly & Porter, Simcoe, solicitors for executor.

Heyd & Livingston, Brantford, solicitors for A. R. Chatterson.

The other parties did not appear, though duly notified.

FALCONBRIDGE, C.J.

MARCH 29TH, 1902.

TRIAL.

NORTHMORE v. ABBOTT.

Will—Action to Set Aside—Application for Probate—Withdrawal of Caveat—Burden of Proof—Want of Testamentary Capacity—Undue Influence.

Action for a declaration that a certain document dated 8th August, 1894, purporting to be the last will of Hannah E. Fenwick, deceased, whereby the defendant was appointed executor, was not the true will of the deceased. The document had been admitted to probate and the defendant was in possession of the estate. The plaintiff, who was a sister of the deceased, alleged undue influence and want of testamentary capacity.

The action was tried without a jury at Kingston.

A. B. Cunningham, Kingston, for plaintiff.

J. L. Whiting, K.C., and F. M. Brown, Kingston, for defendant.

FALCONBRIDGE, C.J.—Defendant applied about 8th September, 1900, to the Surrogate Court for probate of the alleged will of Hannah Fenwick, whereupon Barnabas Dawson, a brother of deceased, and John Pope, husband of a deceased sister, lodged a caveat. Then an arrangement was arrived at whereby the defendant paid them \$1,500 as consideration for their withdrawing the caveat and agreeing to place no barriers in the way of the defendant's obtaining quiet possession of the estate. There were ten sets of heirs or next of kin, including Dawson and the children of Pope; the estate was worth about \$5,000; so that Dawson and Pope got each \$250 more than Dawson, or Pope as representing his children, would have received upon an intestacy. By this selfish and suspicious arrangement defendant obtained probate of the document and possession of the estate; but he is not in any better position by reason of the probate thus obtained, as regards onus of proof or otherwise, than if he were now originally propounding the will.

The evidence against the capacity of deceased to make a will on 8th August, 1894, rather preponderated over that offered for the defence. But on the facts and the authorities there is a clear case of undue influence. The will was drawn by a magistrate. . . . There is the significant fact that he drew and caused to be signed by Hannah Fenwick and the defendant (at the same time as the alleged will was signed) an agreement bearing even date with the alleged will, whereby deceased, "in consideration of her maintenance during her natural life and other valuable considerations," granted and assigned to defendant all her money on deposit, notes, mortgages, and furniture, being all or practically all her property. Such a paper was never prepared by any one really acting in the interest of deceased, and it sheds light on the circumstances attending the execution of the alleged will. . . .

Judgment declaring the alleged will to be void and of no effect, with costs.

A. B. Cunningham, solicitor for plaintiff.

F. M. Brown, solicitor for defendant.

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MOSS, J.A.

MARCH 22ND, 1902

C.A.-CHAMBERS.

EVANS v. EVANS.

Will—Construction—Leave to Appeal.

Leave to appeal from order of a Divisional Court, ante p. 69, refused.

MEREDITH, J.

APRIL 3RD, 1902.

WEEKLY COURT.

GODBOLD v. GODBOLD.

Executor—Insolvency—Administration of Estate by Court—Motion for—Undertaking to Pay into Court—Costs.

Motion by plaintiffs for an order for administration of the estate of Sylvanus Godbold the elder, or, in the alternative, for a receiver of the estate, upon the ground that the defendant Sylvanus Godbold the younger, the sole executor of the will of the senior, was insolvent and not a proper person to be left in sole control of the estate, which was of the value of about \$17,000.

W. E. Raney, for plaintiffs.

E. F. B. Johnston, K.C., and D. T. Smith, for defendant executor.

B. N. Davis, for defendants Harriman and Sarah J. Godbold.

MEREDITH, J.—Upon the executor undertaking to pay into Court, from time to time, forthwith after receiving them, all moneys, proceeds of the estate in question, received by him, this motion is to be dismissed; costs of all parties, as of a simple motion to compel payment into Court by the executor of moneys of the estate admitted to have come to his hands, to be paid out of the estate in question; costs of all parties other than the plaintiffs, over and above such as are to be paid out of the estate, to be paid by the plaintiffs forthwith after taxation. No other order upon this motion; but, if the executor decline to give the undertaking, the matter may be mentioned again.

McDOUGALL, Co. J.

DECEMBER 26TH, 1901.

COUNTY COURT OF YORK.

RE MACPHERSON AND CITY OF TORONTO.

RE HAMILTON AND CITY OF TORONTO.

*Assessment and Taxes—Personal Property—Exemptions—Trustees
—Non-resident Beneficiaries—Income of Trust Estate.*

Appeals by the trustees of the Macpherson and Hamilton estates from the decisions of the Court of Revision for the city of Toronto in respect of the assessments made upon the estates respectively.

J. T. Small, for the trustees of the Macpherson estate.

W. A. H. Kerr, for the trustees of the Hamilton estate.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, Co. J.—In the Macpherson and Hamilton estate appeals the effect of the amendment made in 1900 to sec. 46 of the Assessment Act must be again considered. The Macpherson estate is administered in Toronto. The will was proved in this county, and several of the trustees reside here. Some of the beneficiaries reside in this Province, and others reside out of the Province. The income of the estate is collected at Toronto; the annual accounting is made by the trustees here, and the various annual shares of the income payable to the beneficiaries is distributed from this point, the shares of the non-residents being transmitted to them out of the Province. It is conceded that the shares of those resident in the Province are liable to assessment, but it is contended that the shares of the non-residents are not so liable. Section 46 of the Assessment Act was a section which, before amendment, contained a provision only as to the manner of assessment of personal property vested solely in third persons, trustees, guardians, executors, or administrators, namely, that such property could be assessed in the name of such third persons, trustees, etc., alone. This provision obviated the necessity of the assessor ascertaining who the cestuis que trust were, and of placing their names on the assessment roll. The amendment directs that the assessment shall be made in the name of such person, trustee, etc., alone, in cases only where, if the personal property were in possession of the beneficiary, the same would be liable to taxation. The amendment does not define any new principles of assessment or exempt any particular class of personal property from taxation. It does not qualify the general direction contained in sec. 7 that "all property in the Province shall be liable to taxation," nor does it affect the further direction contained in sec. 38 that all personal property within the Province owned by non-residents shall

be assessed like the personal property of residents, nor the further provision in sec. 38 that such personal property of a non-resident may be assessed in the owner's name as well as in the name of the agent or trustee who may have the property in his possession or control or in his hands on behalf of such non-resident owner. It might happen that personal property in the hands of an agent or trustee would in his hands be liable to assessment for the full amount, while if assessed to the owner the assessment value might be largely reduced by the application of certain of the exemption clauses contained in sec. 7. Take, for instance, the case of a stock of goods vested in and assessed to an agent; such agent could not claim the deduction from the invoiced value of the said goods of the debts due in respect thereof by the real owner allowed by sub-sec. 24 of sec. 7 in respect of such goods, because he, the agent, did not owe the debts; whereas, if the goods were assessed in the true owner's name, such allowance would have to be made. In the case of an income received by a trustee for and on behalf of a beneficiary, and assessed in the trustee's name, such trustee could only claim the \$400 exemption allowed by sub-sec. 26 from income. Take a trustee who collected the income of a large estate amounting to say \$4,000 per annum, and by the terms of his trust was to distribute it equally amongst ten beneficiaries, who possessed no income from any other source beyond this distributive share of \$400; the ten persons, the true owners of the income, would not be liable to any taxation whatever in respect of their several shares, since the total income of each would not exceed the \$400 exempted. If the whole income is taxed in the hands of a trustee, it is not necessarily treated as income in his hands, but might be assessed as so much personal property belonging to others and liable to taxation for the full amount of \$4,000, or, as I have said before, should it be treated as income, it will be liable to the one exemption of \$400 only. I take it, therefore, that the only force to be attributed to the amendment is this, that the personal property standing in the trustee's hands is to be considered as split up into distributive portions belonging to the several beneficiaries, and if such several sums, or one or more of them, would, if assessed in the name of the beneficiary, not be liable to taxation by reason of any exemption clause, then to the extent of such an amount the same is not to be assessed in the name of the trustee. I do not think the question of residence or non-residence of the beneficiary enters into the consideration of the matter at all.

Section 38 of the Assessment Act reads as follows:

"38. (1) All personal property within the Province, the owner of which is not resident in the Province, shall be

assessable like the personal property of residents, and whether the same is or is not in the possession or control, or in the hands, of an agent or a trustee on behalf of the non-resident owner; and all such personal property of non-residents may be assessed in the owner's name, as well as in the name of the agent, trustee or other person (if any) who is in the possession or control thereof.

"(2) The property shall be assessable in the municipality in which it may happen to be.

"(3) This section shall not apply to dividends which are payable to, or other choses in action which are owned by, and stand in the name of, a person who does not reside in the Province. . . ."

It is thus seen that the personal property of a non-resident is declared to be assessable like the personal property of a resident, whether the same is or is not in the hands of an agent or trustee on behalf of a non-resident owner. I do not think the words of the amendment, "which if in the possession of the beneficiary would be liable to taxation," alter the force of sec. 38 as to the incidence of taxation. I think the fair meaning is, that personal property is only exempt in a case where, if the same were assessed in the name of the owner, it would not be liable to taxation. It would require much more definite words of exemption to repeal the express liability to taxation of the personal property of non-resident owners created by sec. 38. What I take to be the object of the amendment was to remedy what appeared to be an injustice, namely, that a non-resident owner entitled to a sum of money by way of income should have that sum taxed before it reached his hands, while, if he had been entitled to collect it himself, it would not have been taxable at all. In his own hands he would be entitled to have an account taken of income and proper outgoings, and, should such an account shew no surplus, there would be no amount liable to taxation. It never could have been contemplated by the Legislature, in my opinion, to change the whole policy of the law which made personal property situate in the Province, though owned by non-residents, liable to taxation, by the simple method of interposing a trustee; in other words, that the personal property of a non-resident owner standing in his own name or that of an agent should be taxable, while the same property, vested in a trustee, would not be taxable, because the true owner was a non-resident. In the latter case the personal property would be viewed as being in the actual possession and following the person of the owner, and, therefore, as property situate out of the Province, while in the former case it would be treated as situate within the Province and as not following

the person of the owner. The words, "and which if in the possession of the beneficiary or beneficiaries," I think, must be taken to mean or to be equivalent to the words, "as if the same were assessed in the name of the beneficiary or beneficiaries himself or themselves," that is, the fact of the same being vested in a trustee is to be disregarded in considering its liability to taxation. If the beneficiary was a non-resident, the amount coming to him would be treated precisely in the same manner as the personal property of other non-resident owners and liable to taxation, *sub modo*, under the provisions of sec. 38. If the effect of the amendment is as wide as was contended for, then all personal property of non-resident owners standing in the name of a trustee ceases at once to be taxable because such personal property is to be considered as attached to the person of the owner and treated for assessment purposes as personal property not situate in the Province. The far-reaching effect of such an interpretation of the law would be almost incalculable. Millions of dollars of personal property in the hands of trustees on account of non-resident owners would under such a meaning become exempt.

In the Macpherson estate appeal, then, I am of opinion that, if the sums payable to the non-resident beneficiaries are in the nature of income, it is liable to the same burdens and entitled to the same exemptions as the income of residents of this Province, and the appeal will, therefore, be allowed to the extent above indicated.

The appeal in the Hamilton estate presents some different features upon the facts. In that case the principal part of the estate is in the Province of Quebec, where the testator lived and died. Two trustees reside in Ontario and one in Quebec; the accounting by the trustees is at Quebec, whence the payments to the beneficiaries are made. The sum sought to be assessed is the annual interest, some \$5,000, upon investments in Toronto, part of such investments having been made by the testator in his lifetime and part of them made from estate funds by the trustees in Toronto since the testator's death. Two of the beneficiaries live in Ontario, and three out of the Province, and the income, as I understand the statement of counsel, is ascertained at Quebec, and the different shares transmitted to the several persons entitled from that point. For the reasons given in the Macpherson estate appeal, I am of opinion that the interest collected from investments in Toronto is taxable in this municipality subject to the exemption contained in the statute of \$400 in respect of each beneficiary.

The appeal will, therefore, be allowed to the extent above indicated.

Henderson & Small, Toronto, and Blake, Lash, & Cassels,
Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

McDOUGALL, Co. J.

DECEMBER 26TH, 1901.

COUNTY COURT OF YORK.

RE NASMITH AND CITY OF TORONTO.

*Assessment and Taxes—Personal Property—Choses in Action—
Property not already Assessed—Court of Revision.*

Appeals by Mrs. J. D. Nasmith, Miss E. M. Clark, and Miss H. Clark from the decision of the Court of Revision for the city of Toronto, placing their names on the assessment roll in respect of certain personal property.

J. H. Macdonald, K.C., for the appellants.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, Co. J.—In this case the Nasmith Company were assessed upon personalty for \$17,000, and appealed to the Court of Revision on the ground that the same was too high, contending that, if the indebtedness in respect of such personalty were deducted pursuant to sub-sec. 24 of sec. 7 of the Assessment Act, the assessable amount would be found to be less than \$17,000. When the matter came up before the Court of Revision the appellants proved that they were indebted to the following persons in respect of such personal property: Mrs. J. D. Nasmith, \$2,482; Miss E. M. Clark, \$1,336; and Miss H. Clark, \$1,578: and the Court of Revision reduced the general assessment of the company to \$15,000 for personal property. Pursuant to sub-sec. 15 of sec. 71 of the Assessment Act, four days' notice was given to these three creditors, and the Court of Revision then placed their names on the assessment roll for the above several sums as personal property in respect of which they, the creditors, were liable to be assessed. The three creditors appealed, and I allowed their appeal upon the ground that the Court of Revision had not the power to place them on the roll. The property in respect to which the Court of Revision sought to assess them, namely, choses in action, had not been previously assessed at all, and, although the Court has the power to assess A. (upon giving him a four days' notice) for property which had been improperly assessed in B.'s name, yet A. could only be assessed in respect of some portion or all of the property already assessed or purporting to be assessed.

Now, the property of these three appellants had never been in fact assessed at all. Had the department known they possessed personal property in the shape of choses in action or debts due them, the same could have been properly assessed to them. What had been assessed was the

personal property of the Nasmith Company. What they did assess in the present case was the property of third persons not theretofore assessed to the Nasmith Company at all. The amounts of such choses in action, belonging to the appellants, it is true, as debts due them by the Nasmith Company, under sub-sec. 24 of sec. 7, were properly allowed to be deducted from the value of the personalty found on the Nasmith premises, but were in no sense part of that property. It will be for the Legislature to amend the Act, if it sees fit, to allow property of third persons, discovered by reason of the investigation into the affairs of a ratepayer who appeals from his own assessment, to be assessed, upon such terms as it may impose, but, in my opinion, the statute as it now stands does not permit this to be done. If the Nasmith Company had some personal property upon their premises which belonged to a third person, but the value of which was included in the assessment of their own personal property, I have no doubt, the true owner being ascertained, that he could, upon being given the statutory notice of four days, be assessed therefor, but, in my judgment, these choses in action do not come within the present provisions of the section. The appeals will, therefore, be allowed.

Maclaren, Macdonald, Shepley, & Donald, Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

McDOUGALL, Co. J.

DECEMBER 26TH, 1901

COUNTY COURT OF YORK.

RE LEADLEY AND CITY OF TORONTO.

Assessment and Taxes—Exemptions—Personal Property Owned out of Province—Cash in Banks—Trustees.

An appeal by the trustees of the Leadley estate from the decision of the Court of Revision for the city of Toronto in respect of an assessment of the estate.

J. W. St. John, for the appellants.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, Co. J.—The appeal in this case is in reference to certain personal property standing in the names of the trustees of the Leadley estate, and consisting of certain amounts of cash deposited in banks in the city of Montreal, and in the city of Winnipeg. It is claimed by the assessment department to be liable to assessment in Toronto, where the trustees reside, and where the chief assets of the estate are situate, and where the estate is being administered. I have ruled that the same is exempt from taxation under sub-sec. 23 of sec. 7 of the Assessment Act, as being personal property owned out of the Province.

I refer to the decision, and particularly to the judgment of Burton, J.A., in *Nichol v. Douglas*, 37 U. C. R. 51.

The appeal is allowed, and assessment reduced to \$43,000.

St. John & Ross, Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

MEREDITH, J.

APRIL 3RD, 1902.

TRIAL.

GRANT v. McPHERSON.

*Landlord and Tenant—Agreement for Lease—Incomplete Contract—
Nature of Tenancy—Possession.*

An action to recover possession of a house in the city of Toronto and for mesne profits, the defendant having become tenant to the plaintiff under a supposed agreement for a lease.

W. M. Douglas, K.C., and J. E. Jones, for plaintiff.

E. D. Armour, K.C., for defendant.

MEREDITH, J.—Upon the whole evidence it cannot be found that there was any agreement for a lease. The parties were agreed upon most of the terms of the lease, but, as to some essential terms, there was a misunderstanding, and no agreement. . . . The defendant, among other defences, sets up the agreement as he understood it, and seeks specific performance of it. There cannot of course be specific performance, the parties never having been at one upon some of the essential terms of it. But the relationship of landlord and tenant, in some form or other, obviously existed between the parties: the one question is, what was the nature and extent of it? And that is purely a question of fact. At the end of the second year the plaintiff became entitled to possession, and he has done nothing to waive that right. . . . I have found no case in point; those decided under the Statute of Frauds are different at the beginning in this, that the statute expressly provides that the lease shall operate as a tenancy at will, though after payment of rent in such cases there seems to be no substantial difference between those cases and this. *Lennox v. Westney*, 17 O. R. 472, differs from this case in the essential feature that in that case no rent had been paid: there was no recognition of any relationship of landlord and tenant after the incomplete negotiations for a lease. The cases under the statute are collected in the note to *Doe d. Regge v. Bell*, 2 Sm. L. C. 1342, and *Clayton v. Blakey*, *ib.* 1347. See *Sourwine v. Truscott*, 17 Hun 432; *Fullerton v. Dalton*, 58 Barb. 236; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Smith v. Widlake*, 3 C. P. D. 10.

Judgment for possession without costs.

DuVernet & Jones, Toronto, solicitors for plaintiff.

J. M. Clark, Toronto, solicitor for defendant.

APRIL 7TH, 1902.

DIVISIONAL COURT.

CLERGUE v. MCKAY.

Discovery—Production — Privilege — Letters between Solicitor and Client—Nature of, must be Set Forth in Affidavit.

Decision of STREET, J., *ante* 178, affirmed by a Divisional Court (BOYD, C., FERGUSON, J., MEREDITH, J.)

W. M. Douglas, K.C., for defendant Preston, appellant.

A. B. Aylesworth, K.C., and R. U. McPherson, for plaintiff.

FALCONBRIDGE, C.J.

APRIL 7TH, 1902.

WEEKLY COURT.

STEPHENS v. O'CONNOR.

Liquor License Act—Transfer of License to New Premises—Notice—Report of Inspector—Injunction.

Motion for judgment, heard at Ottawa. The motion was originally to continue an interim injunction restraining the defendants, who are the license commissioners of the city of Ottawa, from permitting the transfer of the bar license for the Globe Hotel in Sparks street to other premises in the same street. The motion was turned by consent into a motion for judgment.

J. L. McDougall, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants.

FALCONBRIDGE, C.J.—The action and motion were probably unnecessary or premature, inasmuch as it was not to be assumed that the board of license commissioners would do anything contrary to the law. But the Legislature has not required that public notice shall be given of an application for a transfer to premises within the same sub-division. See Sinclair's Liquor License Act, p. 32 *n*. The board will, doubtless, not grant, or assent to, the transfer without the report of the inspector under sec. 11, sub-sec. (1), of R. S. O. ch. 245, unless there are valid reasons under sub-sec. 4 for dispensing with the same. The circumstances of the case do not bring it within the mischief dealt with in *East v. O'Connor*, 2 O. L. R. 355. Injunction dissolved and action dismissed with costs.

Latchford, McDougall, & Daly, Ottawa, solicitors for plaintiff.

MacCraken, Henderson, & McDougall, Ottawa, solicitors for defendants.

BRITTON, J.

APRIL 7TH, 1902.

CHAMBERS.

HUFFMAN v. HULL.

Pleading—Statement of Claim—Particulars—Mortgage—Sale under Power—Conspiracy—Account.

Application by the defendant Hull to compel the plaintiff to amend paragraphs 5, 7, and 8 of statement of claim, or for particulars.

The plaintiff alleged that he and defendant Hull were the owners of certain land, subject to a mortgage to one Harris; that by the result of an action between plaintiff and defendant Hull, plaintiff became sole owner, subject to the Harris mortgage.

(5) That under the power of sale in the Harris mortgage the land was sold, and the defendant Allen became the purchaser in trust for plaintiff, and Allen now holds the land as trustee for plaintiff.

(7) The defendants contrived and conspired together to defraud the plaintiff and deprive him of the value of the land over and above the mortgage under which it was sold.

(8) That as between plaintiff and defendant Hull, plaintiff is entitled to all the moneys which may be found due by defendant Allen in connection with the lands, in priority to defendant Hull.

Plaintiff claimed an account.

The Master in Chambers refused the application as regards paragraphs 5 and 8, but ordered particulars under paragraph 7 to be delivered after defence and after examination of defendants for discovery.

The defendant Hull appealed.

H. E. Rose, for appellant.

A. C. McMaster, for plaintiff.

BRITTON, J.—I think the plaintiff might well have been more full and specific in his statement of claim, but I do not think the defendant Hull need be at all embarrassed in regard to his statement of defence. If the plaintiff has any claim such as indicated, Hull can easily meet it as a matter of pleading. I do not think I should interfere with the order made by the Master. Appeal dismissed. Costs in cause.

Brewster, Muirhead, & Heyd, Brantford, solicitors for plaintiff.

A. S. Ball, Woodstock, solicitor for defendant Hull.

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APRIL 8TH, 1902.

DIVISIONAL COURT.

RANKIN v. STERLING.

*Vendor and Purchaser—Specific Performance—Possession—Waiver—
Improvements—Account as to—Title by Possession—Costs.*

Action for specific performance of a contract dated 23rd February, 1901, for the sale to plaintiff for \$380 of a piece of land in the village of Campbellford; \$75 was to be paid down and possession given, and the balance of the purchase money with interest was to be paid on or before 1st May, 1901, when the conveyance was to be given. The defendant, the vendor, was to furnish an abstract, to make out a perfect title, and to deliver the conveyance at his own expense. The abstract shewed a good paper title from the Crown to Richard VanNorman, who became owner in 1862, and had made a mortgage to his vendor, one Wilkins, which had never been discharged. No title was ever shewn from VanNorman or Wilkins to the defendant, but his solicitor sent a statutory declaration shewing title by length of possession, which plaintiff alleged was incorrect. He, however, continued in possession and made improvements, and on the 2nd August, 1901, commenced this action. It was admitted at the trial before MacMahon, J., that the only objection to the title was how it passed from VanNorman. The trial Judge held that the plaintiff had not waived his right to have a good title shewn, and directed a reference as to title, and, in case a good title could not be shewn, directed that the Master was to ascertain the value of the plaintiff's improvements and what would be a fair occupation rent, and reserved further directions and costs. The defendant appealed.

J. J. Warren, for defendant.

G. H. Watson, K.C., and W. L. Payne, Colborne, for plaintiff.

The judgment of the Divisional Court (FALCONBRIDGE, C.J., and STREET, J.) was delivered by

STREET, J.—By the terms of the contract the plaintiff was entitled to a perfect title, and the defendant continued to assert down to the trial that he had a good title, either by paper title or by possession. Under these circumstances the plaintiff's remaining in possession should not be held to be a waiver of his right to insist upon a good title being shewn. Waiver is a question of intention, to be determined from the acts of the party, and it seems impossible to hold that the purchaser has waived his right to a good title by acts done at a time when he was insisting upon a good title being shewn, and the vendor was insisting that his right was perfectly good: *Re Gloag and Miller*, 23 Ch. D. 320. The question of waiver was the only question upon the pleadings necessitating a trial, and, had it not been raised, judgment might have been obtained upon a motion, for the only other question raised upon the pleadings which could be disposed of before the question of title had been determined, was that of title, and that would have been referred to the Master upon motion on the pleadings. Having failed upon the question of waiver, therefore, the defendant must pay the costs of the hearing.

There should also be a general reference as to title to enable plaintiff to make title either from VanNorman or by possession, the latter being a title which a purchaser may be compelled to take if it can be satisfactorily established: *Scott v. Nixon*, 3 Dr. & War. 388; *Gaines v. Bonnor*, 33 W. R. 64; *Dart V. & P.*, 6th ed., p. 462.

An account should not have been directed as to improvements. There is nothing in the pleadings or evidence to take this case out of the general rule which restricts the damages of a purchaser to the costs of the investigation of the title: *Bain v. Fothergill*, L. R. 7 H. L. 207. Nor is there anything to bring it within the doctrine of *Engel v. Fitch*, L. R. 3 Q. B. 314, and 4 Q. B. 659. See also *Williams v. Glenton*, L. R. 1 Ch. 209, and *Day v. Singleton*, [1899] 2 Ch. 320, 332-3.

The rule followed in the old case of *Miloson v. Wordsworth*, 2 Sw. 365, and stated by Sugden, 14th ed., p. 347, is that which still prevails in the absence of fraud or other special circumstances. . . .

The reference should be as to title, and when a good title was first shewn. The plaintiff should have costs of the

trial in any event. Further directions and subsequent costs reserved. No costs of appeal.

W. L. Payne, solicitor for plaintiff.

R. L. Gosnell, Blenheim, solicitor for defendant.

MEREDITH, C.J.

APRIL 10TH, 1902.

CHAMBERS.

RE PHILLIPS v. HANNA

Division Court—Jurisdiction—Splitting Cause of Action—Mortgage Interest post Diem—Damages—Permissive Clause of Division Courts Act.

Motion by the defendant for prohibition to the 1st Division Court in the united counties of Northumberland and Durham.

The defendant, in 1884, made a mortgage to the plaintiffs' testator securing \$1,300 and interest. The principal was to be repaid in four instalments of \$100 each in 1888-1891, and the remaining \$900 in 1892. The interest was to be paid annually on the unpaid principal till the whole sum secured should be paid in full.

The whole principal sum being unpaid, the plaintiffs sued the defendant in the Division Court for \$81.50, being one year's interest on the principal sum from 1st February, 1900, to 1st February, 1901, and interest thereon from the latter date.

R. McKay, for defendant.

F. E. Hodgins, for plaintiffs.

MEREDITH, C.J.—The interest for which the plaintiffs sue, being interest *post diem*, is not due to them *qua* interest, but is recoverable only by way of damages, and it was not intended by sec. 79, sub-sec. 2, of the Division Courts Act, R. S. O. ch. 60 (which provides that "where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage . . . he may . . . sue separately for every sum so due"), to qualify the provision (sub-sec. 1) which forbids the dividing of a cause of action, except where the sum claimed for interest is due according to the terms of the instrument sued on. . . . The plaintiffs, if entitled to recover interest from 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were entitled, if interest were allowed at 6 per cent., would be about \$140, and this sum is divided for the purpose of suing in the Division Court, and that is forbidden by sec. 79.

Order made for prohibition with costs.

R. R. Loscombe, Bowmanville, solicitor for plaintiffs.

Simpson & Blair, Bowmanville, solicitors for defendant.

MEREDITH, C.J.

APRIL 10TH, 1902.

CHAMBERS.

UDA v. ALGOMA CENTRAL R. W. CO.

*Particulars—Statement of Defence—Material on Application for—
Order after Issue Joined.*

Action by servant against master for negligence causing personal injuries. The defendants alleged (3) that the injury was caused by the negligence of the plaintiff, and (5) that it was caused by the negligence of the plaintiff's fellow-servant. The Master in Chambers ordered the defendants to give particulars of these defences. The defendants appealed.

W. E. Middleton, for defendants.

H. L. Dunn, for plaintiff.

MEREDITH, C.J.—The material was an affidavit of the plaintiff's solicitor stating that the particulars were required for the purpose of pleading, there being no affidavit from the plaintiff that the nature of the defence intended to be set up was not known to him. Having regard to the nature of the action and these circumstances, the order should not have been made, and I am unable to see what good purpose it can serve except to add to the costs of the litigation. . . . Also, it is manifest that the particulars were not needed for the purpose of pleading, for when the notice of motion was served the pleadings were closed and the cause was at issue.

Appeal allowed; costs to the appellants in any event.

Denton, Dunn, & Boulton, Toronto, solicitors for plaintiff.

Hamilton, Elliott, & Irving, Sault Ste. Marie, solicitors for defendants.

MEREDITH, C.J.

APRIL 10TH, 1902.

CHAMBERS.

PENNINGTON v. MORLEY.

Mechanics' Liens—Action begun by Statement of Claim—Service out of Ontario—Statutes and Rules—Powers of High Court of Justice.

Application by defendants Crosby and Nordyke in an action to enforce a mechanic's lien, which was commenced by

filing a statement of claim pursuant to sec. 31 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. ch. 153, to set aside as against them the judgment pronounced after trial by the Judge of the County Court of Essex, and all proceedings subsequent to the filing of the statement of claim, upon the ground that the statement of claim was improperly served upon the applicants out of the jurisdiction, and, even if that were permissible, no order allowing that mode of service was made. The applicants were not British subjects, and resided in the State of Michigan.

J. H. Moss, for applicants.

W. M. Douglas, K.C., for plaintiff.

MEREDITH, C.J.—The Courts of this Province have no inherent jurisdiction to allow service of any proceeding to be effected out of Ontario; jurisdiction for that purpose must be conferred by statutory authority.

Under the English Judicature Act and Rules the provisions for allowing service out of the jurisdiction form a complete code of procedure, and the English Courts have no jurisdiction to allow service out of England except in cases which come within these provisions, and therefore the service of a statement of claim filed as the initial step in an action may not be so served, it not being mentioned as one of the proceedings which the Court may allow to be served out of its jurisdiction (*In re Busfield*, 32 Ch. D. 123); and there are numerous cases in England to the same effect. See also *Re Confederation Life Association and Cordingly*, 19 P. R. 16, 89.

It follows that, unless our Judicature Act and Rules differ from those of England, there is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

It was argued that Con. Rule 3 has the effect of making the provisions of the Rules as to service of the writ of summons applicable to service of any proceeding by which an action is commenced. That Rule, however, is limited to matters of practice; the matter in question here is not one of practice, but of jurisdiction: *Attorney-General v. Sillem*, 11 H. L. Cas. 703; *In re Anglo-African S. S. Co.*, 32 Ch. D. 348.

[History and review of the Ontario legislation respecting service out of the jurisdiction.]

Service out of Ontario is dealt with by the existing Rules 162-167. They do not extend, in terms at all events, to service of a statement of claim such as that in question, al-

though the Rules which were replaced by them made provision for allowing service, not only of a writ of summons and notice of a writ, but also of any other document by which a matter or proceeding is commenced.

The Ontario Judicature Act, 1881, gave to the High Court of Justice the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by, among other Courts, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas (sec. 9), and therefore the jurisdiction to allow service out of Ontario conferred by R. S. O. 1877 ch. 40, secs. 93, 84, and ch. 50, secs. 49, 50, was vested in the High Court.

I was at one time inclined to think that the effect of this was to make the English cases inapplicable here, but the reasoning which led to the decision in *In re Busfield* is opposed to that view; and I am, therefore, of opinion that our Judicature Act and Consolidated Rules form a complete code on the subject of service out of the jurisdiction, and that the Court had no jurisdiction to allow service of the statement of claim to be effected upon the applicants out of Ontario.

Even if I had been of a different opinion, an order for service out of Ontario not having been obtained, I should have held that the service which was effected was nugatory, and that the Judge had no power to allow service *nunc pro tunc*, as he assumed to do.

It is a defect in the law that no provision is made for service out of the jurisdiction of the initial proceeding in an action unless that proceeding is a writ of summons or a notice in lieu of a writ of summons.

Application granted with costs here and below.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for applicants.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiff.

ROBERTSON, J.

APRIL 10TH, 1902.

WEEKLY COURT.

RE REX v. MEEHAN.

Mandamus—Police Magistrate—Jurisdiction—Information—Criminal Offence—Municipal Election—Voting more than once.

Motion by the prosecutor, A. D. Turner, to make absolute a rule calling on the police magistrate for the city

of St. Thomas and the defendant to shew cause why the magistrate should not be directed to receive the oath of Turner to an information preferred against the defendant. The rule was granted under R. S. O. ch. 88, sec. 6. The information sought to be laid against the defendant was for that he did, on the 6th January last, at St. Thomas, after having voted once and not being entitled to vote again at the election for aldermen, wilfully and corruptly apply for a ballot paper, in his own name, and did wilfully and corruptly vote three times for aldermen, and did thereby commit an interference with an election. The magistrate held (see 1 O. W. R. 136) that he had no jurisdiction to hear the case and dispose of it summarily, or to hold a preliminary investigation and determine whether the accused should be committed for trial if the evidence warranted him in so doing.

By 1 Edw. VII. ch. 26, sec. 9 (O.), it is provided that in towns and cities where aldermen are elected by general vote, every elector shall be limited to one vote. Section 193 of the Municipal Act declares (f) that no person shall, having voted once, and not being entitled to vote again, apply for a ballot paper in his own name; and by sub-sec. 3, a person guilty of any violation of this section shall be liable to imprisonment for a term not exceeding 6 months. By sec. 138 of the Criminal Code, every one is guilty of an indictable offence, and liable to one year's imprisonment, who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any Legislature in Canada, by wilfully doing any act which it forbids, unless some penalty or other mode of punishment is expressly provided by law.

J. M. McEvoy, London, for the applicant.

E. E. A. DuVernet, for the magistrate and the defendant.

ROBERTSON, J.—As the section of the Act of 1 Edw. VII. referred to does not contain a particular mode of enforcing the prohibition, and the offence is new, the only remedy is by indictment, as provided by sec. 138 of the Code. Therefore, the magistrate had jurisdiction to take the information in question and to issue a summons to the defendant to hear and answer the charge, and to hear the case and determine whether the defendant should be committed for trial, and moreover he was bound to do so. And, as the magistrate had not exercised any discretion, but had simply declined jurisdiction, it was the duty of the Court to order him to exercise his jurisdiction.

Rule absolute. Costs of applicant to be paid by defendant.

McEvoy, Pope, & Perrin, London, solicitors for the applicant.

DuVernet & Jones, Toronto, solicitors for the respondents.

MEREDITH, C.J.

APRIL 11TH, 1902.

TRIAL.

PUTERBAUGH v. GOLD MEDAL CO.

Libel—Proof of Publication—Letter Dictated—Privilege.

Action for libel tried at the Toronto Winter Assizes. The jury disagreed, and the defendants moved for judgment in their favour upon the grounds: (1) that publication of the alleged libel was not proved; and (2) that if there had been publication, the occasion was privileged. The alleged libel was a letter written in the name of the defendant company by the defendant Abra, the company's manager, to the plaintiff. The letter was dictated by Abra to the stenographer of the company, who typed it and copied it in the company's letter book.

E. E. A. DuVernet, for plaintiff.

F. C. Cooke, for defendants.

MEREDITH, C.J.—I am bound by *Pullman v. Hill*, [1891] 1 Q. B. 524, to hold that there was evidence of publication and that the occasion of the publication to the stenographer was not privileged. I should have preferred, had I been at liberty to do so, to hold otherwise, and to apply the principle of *Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, and *Harper v. Hamilton Retail Grocers' Association*, 32 O. R. 295, but, in the circumstances of this case, according to the decision in the *Pullman* case, that principle is inapplicable. See 7 *Law Quarterly Review* (1891), pp. 101-2.

Motion refused.

DuVernet & Jones, Toronto, solicitors for plaintiff.

Pinkerton & Cooke, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

REX v. GODSON.

Criminal Law—Incest — Evidence — Contents of Destroyed Letters — Inference from Non-menstruation — Misdirection—Substantial Miscarriage—New Trial.

Case reserved by the Chairman of the General Sessions

of the Peace for the County of York. The prisoner was indicted upon a charge of incest with his daughter on the 21st January, 1900. At the trial the evidence of one Rogers, who arrested the prisoner at Regina, was admitted as to the contents of certain letters written by the prisoner to his daughter and his sister, respectively, and letters received by him from them. The prisoner admitted sending and receiving certain letters, which he said had been destroyed. The evidence was objected to. Evidence as to the contents of the letters was also given by the daughter, and was objected to. In his charge to the jury the Judge said: "There is a circumstance which I will just simply mention in conclusion, that if the aunt and the girl told the truth, she was not with child on the 16th January, because she had her usual monthly courses at that period, five days before the date when this said alleged offence was committed." And upon objection by the prisoner's counsel to these remarks, the Judge added: "I do not say it was conclusive testimony, I only say it was fairly conclusive testimony, that on the 16th January she was not impregnated." "As to the fact of menstruation after impregnation there has been no evidence offered on either side beyond the bare fact that on the 16th January the girl had her usual monthly periods. It is common knowledge, to this extent, that these periods occur at regular intervals, and that they cease after impregnation. It is unfortunate, perhaps, that some of the medical men were not asked along that line, but certainly there is no evidence to shew it is at all a frequent or common occurrence, that a woman will have her menstruation after she has been impregnated."

The prisoner was convicted, and the following questions were reserved for the consideration of the Court:—1. Was the evidence of Rogers and the daughter as to the contents of letters written by her to her father properly admitted? 2. Was the Judge right in charging the jury with reference to the inference that might fairly be drawn from the fact that the girl had not menstruated after the 16th January, 1900? 3. If, in the opinion of the Court of Appeal, the Judge was wrong in either of his rulings, as a matter of law has there been a mistrial?

C. C. Robinson, for the prisoner.

Frank Ford, for the Crown.

OSLER, J.A.—The first question must be answered in the affirmative and the second in the negative. There was

misdirection in telling the jury that the fact of menstruation after the 16th January was fairly conclusive testimony that the girl was not then impregnated. Menstruation after impregnation may perhaps be assumed to be an unusual occurrence; although in the absence of medical evidence it is hardly right for the Court to go that far. In Taylor on Medical Jurisprudence, ed. of 1897, p. 511, it is said to happen, and caution is advised against forming an opinion. Such a direction to the jury was calculated to impress the jury very strongly in favour of the truth of the girl's story as to the date upon which, from the fact that the Chairman has reserved the case, we must infer that a good deal may have turned, having regard to her other evidence, which has not been stated to or brought before this Court. There may have been corroboration of the girl's evidence, but it is not before the Court, and on this important incident the jury were practically told to find against the prisoner, and, that being so, there has been a substantial wrong or miscarriage at the trial within the cases under sec. 746 (f) of the Criminal Code or analogous provisions: *Bray v. Ford*, [1896] A. C. 44; *Attorney-General v. Makins*, [1894] A. C. 57, 69. The offence in question was not one at common law, and was only cognizable in Ecclesiastical Courts.

ARMOUR, C.J.O., MACLENNAN and MOSS, JJ.A., concurred.

New trial directed under sec. 746 (B) of the Code.

APRIL 11TH, 1902.

C. A.

FOWLIE v. OCEAN ACCIDENT AND GUARANTEE CO.

Accident Insurance—“Accidental” Death—Onus of Proof—Finding of Jury—Notice and Particulars of Death—What Sufficient—Waiver—R. S. O. ch. 203, sec. 152.

Appeal by defendants from judgment of BOYD, C., entered for plaintiff upon verdict of a jury. The action was to recover upon an accident policy insuring against “accidental bodily injury caused by violent external and visible means.” The contract was qualified by R. S. O. ch. 203, sec. 152. The deceased was last seen alive at Gravenhurst on 3rd June, 1898, after getting off a north bound train. He was next seen lying on the railway track at Severn Bridge, 8 miles south of Gravenhurst, about 4 the following

morning, by the engine-driver of the south bound train, who loudly sounded the whistle, but the train men saw no sign of life, and the body was run over and so mangled as to make it impossible to tell whether he was alive or dead when struck. On the 6th June, 1898, his son informed defendants' agent at Orillia, and he wrote to the manager at the head office for Canada in Montreal, informing him of the death and stating that the assured "seems to have been walking on the track to or from the station when he was overtaken by a train," and the letter asked for claim papers. The manager in reply forwarded the usual papers, which were completed and returned at once.

H. Cassels and R. S. Cassels, for the appellants.

G. Lynch-Staunton, K.C., and L. F. Stephens, for the plaintiff.

ARMOUR, C.J.O.—The letter of the agent and the fatal death claim forms furnished constitute sufficient notice and particulars to satisfy the condition in the policy that notice and full particulars of the accident must be given within 21 days to the corporation: *Brawstein v. Accidental*, 1 B. & S. 705. In December, 1898, the manager wrote plaintiff that, under the circumstances attending the death, the defendants did not consider themselves liable owing to clause B2 of the policy. . . This amounted to a waiver of fuller particulars or proofs: *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa 325; *Morrow v. Lancashire*, 29 O. R. 377, 26 A. R. 173; *McCormack v. Royal Ins. Co.*, 163 Penn. St. 184. There is no doubt that the death of deceased was from bodily injury caused by violent external and visible means, but the question was whether it was accidental, and of this the plaintiff was bound to satisfy the jury. "Accidental" is defined by R. S. O. ch. 203, sec. 152. Three causes of death were suggested by the evidence: (1) death at the hands of another; (2) death by his own hands; (3) death by a locomotive engine, through voluntary or negligent exposure to unnecessary danger. There was evidence in support of each of these causes which must have been submitted to the jury: *Trew v. Railway Passengers' Assee. Co.*, 5 H. & N. 211, 6 H. & N. 839; *Fidelity Co. v. Wein*, 182 Ill. 496; *Anthony v. Mercantile*, 162 Mass. 354. The charge at the trial called attention to all the facts, and has not been questioned. The jury found that there was "no evidence to satisfy us that this man came to his death by his own hand, but that he came to his death through external injuries unknown to us." This is not a finding that death was "accidental"

within the meaning of the statute, and that was necessary to make defendants liable under the contract. Assuming the finding negatives suicide, it does not follow that the death was "accidental," and the finding is too vague to be construed as a finding of "accidental" death within the statute, and there must therefore be a new trial, but it must be confined to that question. Costs of appeal and former trial to abide the event.

MACLENNAN and MOSS, JJ.A., concurred.

Lees, Hobson, & Stephens, Hamilton, solicitors for plaintiff.

Cassels, Cassels, & Brock, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

FRANKEL v. GRAND TRUNK R. W. CO.

Railways — Carriage of Goods—Claim for Non-delivery—Place of Delivery — Consignees — Refusal to Accept — Termination of Transitus—Position of Carriers—Bailees—Duty to have Goods Ready for Delivery—Damages for Breach.

Action for breach of contract to carry and deliver five car loads of scrap iron which the plaintiffs had sold to a rolling mill company. The contract of sale provided for delivery at the purchasers' mill at Sunnyside, Toronto, and in the shipping bills the property was addressed to the plaintiffs or the mill company, Sunnyside. The mill was situate near the defendants' main track. There was no station there, but there was a siding leading off the track into the mill. The station nearest to the mill was Swansea, and the cars containing the scrap iron arrived there, and notice of their arrival was sent to the plaintiffs and to the mill company. The station agent had previously been instructed by the plaintiffs to deliver all cars addressed to the plaintiffs at Swansea or Sunnyside, to the mill company. The mill company, after inspection of the goods at Swansea, refused to accept them. The cars were not sent on to Sunnyside, but remained at Swansea, and, being in the way of the traffic, had been, before the refusal to accept, run up a side-line and left in a cutting. This was early in February, and while the cars were in the cutting the wheels became covered with clay by reason of a thaw, and then were frozen fast, and the

cars were not got out until the end of April. The trial Judge found in favour of the plaintiffs, and assessed the damages at \$1,000. The defendants appealed.

Wallace Nesbitt, K.C., and H. E. Rose, for appellants.

G. F. Shepley, K.C., and J. Baird, for plaintiffs.

THE COURT held, OSLER, J.A., dissenting, that the mill company were the consignees of the scrap iron, and had a right to put an end to the transitus at Swansea by refusing to receive it, and there was no necessity for the defendants to tender the goods at Sunnyside.

Held, however, MACLENNAN, J.A., dissenting, that the defendants were liable to the plaintiffs in damages for not keeping the cars, after the refusal, in such a position that the plaintiffs could unload them and remove their property.

[The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A. LISTER, J.A., died while the case was under consideration. A majority of the remaining members of the Court agreed upon a judgment varying that of the trial Judge by limiting the plaintiffs' recovery to damages suffered by reason of the delay up to the time that the defendants had placed the cars in such a position that the plaintiffs could take their goods.]

Lobb & Baird, Toronto, solicitors for plaintiffs.

John Bell, Belleville, solicitor for defendants.

APRIL 10TH, 1902.

C. A.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Municipal Corporation — By-law — Vehicles Standing on Highway — Agreement with Railway Companies—Contravention of—Injunction—Quashing By-law not in Public Interest.

Appeal by defendants from judgment of STREET, J., consolidating an action for an injunction with a summary application to quash a by-law of defendants, and granting the injunction and the motion. The plaintiffs were the Canadian Pacific and Grand Trunk Railway Companies and one Leonard, a ratepayer of the city.

By the Municipal Act, R. S. O. ch. 223, sec. 559, subsec. (3), councils of cities, towns, and villages are empowered

to pass by-laws "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places."

The defendants' council passed a by-law, by the first section of which it was enacted that no cab, cart, express waggon, or other vehicle kept for hire, should stand upon or in any street while waiting for hire or engagement or while unengaged upon and in the streets and subject to the regulations thereafter mentioned; and by sec. 2, "the stands for cabs, carriages, and other vehicles kept for hire for the carriage of persons shall be as follows"—proceeding then to define and set forth the several streets and places therein or parts thereof on which such stands should be.

While this by-law was in force an agreement was entered into between the Canadian Pacific and Grand Trunk Railway Companies and the defendants, one clause of which was as follows:—"The Grand Trunk will dedicate to the public a street not less than 66 feet wide, extending along the north side of the Union Station block from Simcoe street to York street. The city agrees that, at the request of the Grand Trunk and the Canadian Pacific, a part of the said street shall be dedicated for cabs or express waggons, but this shall not be done except on such request."

This agreement was expressly authorized by 55 Vict. ch. 90 (O.), and was executed in pursuance of such authority, and Station street, as laid out, represented the street which the plaintiffs the Grand Trunk Railway Company covenanted to dedicate, and which they conveyed to the defendants for that purpose.

The defendants, without the request of the plaintiffs, passed a by-law, 3757, "to authorize cabs, carriages, and express waggons to stand on Station street;" and this was the by-law in question in the action and motion. It was passed upon the request of the cab-owners in the city, and upon a bond being given to indemnify the city against any action, etc.

E. E. A. DuVernet, for appellants.

A. B. Aylesworth, K.C., and Shirley Denison, for plaintiffs.

ARMOUR, C.J.O.—There was without doubt jurisdiction in the Court to enforce the performance by the city of its agreement, and to enjoin it against committing any breach of it. And there was also jurisdiction in the Court to set aside the by-law passed in breach of the agreement, irrespec-

tive altogether of the provisions of the Municipal Act in relation to the quashing of by-laws, just as the Court has jurisdiction to enforce the performance by an individual of his agreement, to enjoin his committing a breach of it, and to set aside whatever he may have done in breach of it. This jurisdiction was properly exercised by the judgment appealed from. The Act 55 Vict. ch. 90, by the express provision of sec. 39 of the Interpretation Act, is to be deemed a public Act, but whether by-law 3757, passed in breach of the agreement made valid and binding by it, can be said to be illegal within the meaning of sec. 378 of the Municipal Act so as to admit of its being quashed under the provisions of that section, at the instance of any resident of the city, or any other person interested in it, merely because it was passed in breach of the agreement, is a more difficult question; but it is unnecessary to determine this, for the by-law was clearly illegal, under the authorities, having been passed not in the interest of the general public, but in the interest of a particular class. There is nothing in the agreement interfering with the dedication of this street to the public or preventing the user of it as a common and public highway, and the drivers of cabs and express waggons, as well as the general public, are entitled to use it as such, but they, as well as the general public, must use it as such common and public highway in a lawful manner: *Rex v. Cross*, 3 Camp. 225; *Rex v. Jones*, *ib.* 229; *Rex v. Russell*, 6 East 427; *Attorney-General v. Brighton*, [1900] 1 Ch. 276.

The appeal must be dismissed with costs.

OSLER, J.A.—The true construction of the agreement, in my opinion, is, that no part of Station street shall be set aside as a stand for cabs, etc., except upon the request of the railway companies. The defendants ask us to read it as if it left them free to pass a by-law under the general section of the Municipal Act, designating the whole street as a stand for cabs, but restraining them from limiting a part only of it for that purpose except upon request. This may be thought an ingenious way of construing the agreement, but it is, I think, an unsound and illusory one, and quite inadmissible. It would defeat, if it were adopted, the very plain object and intent of the agreement. The action was, therefore, well brought to restrain the defendants from committing a breach of the agreement under which the street had been dedicated to the public, and conveyed to them. The terms of the agreement being authorized by special Act, the defendants' powers under the provisions of the general

Act are limited, and can be exercised only *sub modo*, and in accordance with the authority derived under the former.

As regards the motion to quash the by-law; it succeeds on the very plain principle that the defendants have attempted to exercise their powers not *bona fide* in the interest of the public generally,—their only right to act under sec. 559—but at the request and in the private interests of a few members of the public, and upon being indemnified by them against doing an act the impropriety of which, as being contrary to their agreement, the council appear to have been fully alive to: *In re Morton and City of St. Thomas*, 6 A. R. 323; *In re Peck and Town of Galt*, 46 U. C. R. 211.

On every ground, I think the appeal fails and should be dismissed.

MACLENNAN, J.A.—If restricted from designating a part of the street as a stand, the defendants must necessarily be restricted as to every part, and therefore as to the whole. Nor do I think any of the other arguments urged by the appellants are entitled to prevail. The case is simply one of contract, and whatever question there might be of the power of the city to enter into it, is set at rest by the Act of the Legislature. The by-law is a distinct violation of the agreement, for which an action is a proper mode of seeking redress, and, in my opinion, the jurisdiction of the Court is clear to declare the by-law illegal, and to restrain further violation by injunction. The only way in which the defendants could violate the agreement was by passing a by-law, and an injunction to restrain the violation of the agreement necessarily extends to future by-laws. The judgment might have included an award of nominal damages for the breach of contract, and it would then be in form, what it is now in substance, a common law action, with an award of an injunction rendered proper and necessary, inasmuch as the breach of the agreement was deliberate.

It is not necessary to do so, and I refrain from expressing my opinion upon the rights of licensed cab and express men to use the streets in question in following their business; or on the question whether, in the absence of by-law to the contrary, they may not stand anywhere upon any street waiting for employment, so long as they do not obstruct traffic.

Moss, J.A.—I agree.

MacMurchy, Denison, & Henderson, Toronto, solicitors for plaintiffs.

DuVernet & Jones, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J.

APRIL 12TH, 1902.

TRIAL.

HAM v. PILLAR.

Vendor and Purchaser—Delivery of Conveyance—Covenant for Possession—Enforcement.

Action to compel a vendor to give possession of the land conveyed, under the covenant in the conveyance. Tried at Kingston.

H. L. Drayton, Toronto, and J. English, Napanee, for plaintiff.

J. L. Whiting, K.C., for defendant.

FALCONBRIDGE, C.J.—The plaintiff is entitled to rely on his covenants. There is but little dispute as to what took place on the 31st October, but, in any view of the facts, plaintiff's rights under the deed were not taken away. The deed was not delivered by mistake. There was ample opportunity for deliberation and consultation, inasmuch as the deed had to be sent for and procured from the office of defendant's solicitor. It does not seem to be a case for specific performance, but for damages. Judgment for plaintiff with costs up to judgment. Reference to Master at Napanee as to damages. Further directions and subsequent costs reserved. Thirty days' stay.

J. English, Napanee, solicitor for plaintiff.

J. Mudie, Kingston, solicitor for defendant.

APRIL 12TH, 1902.

C. A.

GRAVES v. GORRIE.

Copyright — Works of Fine Art — Imperial Acts — Application to Colonies.

Appeal by plaintiffs from order of a Divisional Court (1 O. L. R. 309) affirming judgment of ROSE, J. (32 O. R. 226). The plaintiffs are art publishers in London, England. The defendant is a printer and publisher in Toronto, Ontario. The plaintiffs claim to be entitled to the copyright in Great Britain and Ireland, and the British colonies and possessions,

of a picture of the bull-dog on the Union Jack known as "What we have we'll hold," first published in London in July, 1896, and duly entered by the plaintiffs at Stationers' Hall, London, pursuant to 25 & 26 Vict. ch. 68 (Imp.) The Courts below held that the said Act, which is an Act amending the law relating to copyright in works of fine art, does not extend to the colonies.

J. T. Small, for plaintiffs.

J. H. Denton, for defendant.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held, as to the territorial application of the Act, that there are no words expressly extending the area of protection of a copyright granted by it to the colonies, and it was laid down as long ago as 1769, in *Rex v. Vaughan*, 4 Burr. 2500, that no Act of Parliament made after a colony is planted is construed to extend to it without express words shewing the intention that it should. If this rule was proper, then it is much more proper that it should prevail in 1862. See also *Routledge v. Low*, L. R. 3 H. L. 100; *Williams v. Davis*, [1891] A. C. 460; *New Zealand v. Morrison*, [1898] A. C. 349. A consideration of the scope and object of the Act does not lead to the conclusion that it was intended to affect the colonies, nor are the words used calculated to have that effect, nor can it be said that the policy of Parliament supports such a conclusion. By reference, too, to the various Copyright Acts it will be seen that when it is intended to include the colonies, express words are used. (Review of them.) Nor can the intention to include the colonies be gathered from a careful consideration of the wording of the different sections of the Act. The object of sec. 8 was to put authors of all literary and artistic works first produced in the British possessions upon the same footing and entitle the authors of all literary and artistic works first produced in those possessions to the benefit of the Copyright Acts, but this had not the effect of extending the area of protection granted by the Copyright Acts to the British possessions: *Page v. Tounand*, 5 Sim. 395; *Winslow*, 92. By no reasonable construction can the application of sec. 9 of the International Copyright Act "to every British possession as if it were part of the United Kingdom," have the effect of applying the Copyright Acts "to every British possession as if it were part of the United Kingdom," and as extending the area of protection granted by those Acts "to every part of the British possessions as if it were part of the United

Kingdom." The judgments below are right and should be affirmed and the appeal be dismissed with costs.

Henderson & Small, Toronto, solicitors for plaintiffs.

Pearson & Denton, Toronto, solicitors for defendant.

APRIL 12TH, 1902.

C. A.

RE CITY OF TORONTO ASSESSMENT APPEAL

*Assessment and Taxes—Valuation of Property—Electric Companies—
Ralls, Poles, and Wires—Wards—Franchise—Going Concern—
Integral Part of Whole—1 Edw. VII. ch. 29 (O.)*

Appeal by the city corporation from a decision of the County Judges of York, Halton, and Ontario, upon the question of the assessment of the Bell Telephone Company, the Toronto Electric Light Company, the Toronto Railway Company, and the Toronto Incandescent Light Company, in respect of plant, including wires, poles, etc. The board of County Court Judges reduced the assessments as confirmed by the Court of Revision. The question upon the appeal was whether the board of Judges were right in deciding that the Act 1 Edw.VII. ch. 29, sec. 2 (O.), made no difference in the mode of valuing the rails, poles, wires, and other plant belonging to the companies, erected or placed upon the highways, which was held to be proper by the decision in *Re Bell Telephone Co. and City of Hamilton*, 25 A. R. 351, and *Re London Street R. W. Co.*, 27 A. R. 83.

A. B. Aylesworth, K.C., and J.S. Fullerton, K.C., for the city corporation.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for the Bell Telephone Company.

H. O'Brien, K.C., for the Toronto Electric Light Company and the Toronto Incandescent Light Company.

J. Bicknell and J. W. Bain, for the Toronto Railway Company.

THE COURT (ARMOUR C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) held (MACLENNAN, J.A., dissenting) that the board of Judges were right in their decision.

OSLER, J.A.—The new clause does no more than enable the assessor to assess the property all together in one ward,

or to apportion the assessment among two or more of the wards, as he may deem it convenient. It merely removes one of the difficulties pointed out in the cases before decided, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use to a going concern, is to be ascertained by the application of the rule provided by sec. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if it were all in one ward. That is to say, as a whole or as an integral part of a whole, but still without reference to its connection with a franchise or its use as the property of a going concern. The learned chairman of the board (McDougall, Co. J.) has given a very full and satisfactory exposition of the new section, to which nothing can be added, except that the decisions by which the Court of Appeal is bound require much more comprehensive legislation to remove their effect than anything which is found in that clause.

ARMOUR, C.J.O., and MOSS, J.A., wrote opinions to the same effect.

MACLENNAN, J.A. (dissenting)—The injunction to assess all property at its actual cash value still remains. So does the mode of appraisement, as if in payment of a just debt from a solvent debtor. But the obligation to assess in several wards is swept away, and it may be assessed all together in any one ward, or it may be apportioned amongst two or more wards, and in either case it shall be valued as a whole, or as an integral part of a whole. Each of the companies owns, and is assessed for, freehold land in the ordinary sense, as well as for their rails, poles, wires, etc., upon the public streets, and the two kinds of real estate are connected, both in construction and in use, and, taken together, answer the description in the sub-section "real property belonging to . . . any . . . incorporated company, and extending over more than one ward in any city," and what the section says is, that it may be assessed together in any one of such wards. That is what has been done here. It has been valued as a whole, that is, as if the company, being solvent, were conveying the whole to a creditor in payment of a just debt. In valuing the land of the company extending over several wards *as a whole*, the value of the rails, poles, wires, etc., must be included as a part of the whole. But, even if it becomes necessary to value a part of the company's real property separately, as in the case of that part which may be in a township outside of a

city or town, where perhaps it has no land other than the rails, poles, wires, etc., on the public highways, the result must be the same. It must be the full value of these fixtures to the company, because they must be valued as an integral part of the whole. It plainly means, that it is not to be valued without reference to the whole of which it is a part, but as an essential part of the whole—as something without which the whole would be incomplete. It is to be valued, in short, at what it is worth to the debtor, being solvent, as a part of the whole, so that he, being solvent, would be willing to let it go at that value in payment of a debt.

Appeal dismissed with costs.

APRIL 10TH, 1902.

DIVISIONAL COURT.

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461.

Appeal by plaintiff from order of STREET, J., in Chambers (*ante* 180), reversing order of Master in Chambers, which allowed plaintiff to examine for discovery, as an officer of defendants, an incorporated company, the driver of an engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of his death, in an action against the company for negligence causing such death. Upon the appeal the book of the defendants' rules, which was not before STREET, J., was put in evidence.

J. G. O'Donoghue, for plaintiff.

D. L. McCarthy, for defendants.

BOYD, C.—The engine-driver was practically in charge of the train after the conductor was killed, and he is the man who presumably knows at first hand how the accident happened, and is in this regard the proper person to make discovery. He is also an "officer" of the company, recognized as such and so named in the Railway Act, R. S. C. ch. 190, sec. 85 (1) and (4); see also 51 Vict. ch. 29, sec. 214 (g), and secs. 243, 292. The rules of the company indicate that both driver and conductor are in charge of a train.

Dawson v. London Street R. W. Co., 18 P. R. 223, Casselman v. Ottawa, etc., R. W. Co., *ib.* 261, and Odell v. City of Ottawa, 12 P. R. 446, followed.

FERGUSON, J., agreed.

MEREDITH, J., agreed that the engine-driver was an officer, but did not base his opinion upon the peculiar circumstances of this case.

Appeal allowed and order of Master restored. Costs of appeal and below to be in the cause.

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WINCHESTER, MASTER.

MARCH 24TH, 1902.

CHAMBERS.

REX EX REL. ROSS v. TAYLOR.

*Municipal Elections—Quo Warranto Proceeding—Cross-examination
on Affidavits—Discretion as to Permitting.*

Application by relator for an order allowing him to proceed and cross-examine the several persons who had made the affidavits filed by respondent in answer to the affidavits filed by relator in support of his motion in the nature of a *quo warranto* to void the election of respondent as reeve of the village of Port Dover.

W. M. Douglas, K.C., for relator.

S. C. Biggs, K.C., for respondent, opposed the application on account of the great expense, which would exceed the amount of the relator's recognizance.

THE MASTER IN CHAMBERS.—I have read all the affidavits filed, and, in my opinion, the application should not be granted. In *Regina ex rel. Piddington v. Riddell*, 4 P. R. 80, the late Mr. Justice Morrison in delivering judgment said, at p. 85: "On the argument I was pressed by counsel for the relator to order further proceedings with a view to the oral examination of the parties and the production of their books for the purpose of impeaching the facts sworn to by Clinkinbroomer and the defendant. I could only be warranted in doing so upon the ground that I considered the facts sworn to, to be untrue. I see no reason for my thinking so." In that case argument had taken place upon the affidavits filed; here no argument has been heard. I refer to the case to shew that it was a matter of discretion as to permitting the examination or not. In using this discretion I think that no examination would be helpful to me in considering the matter. The relator has the right to file affidavits in reply to those on behalf of the respondent. He will have an opportunity of doing so if he desires it, and the matter will stand adjourned for that purpose.

H. A. Tibbetts, Port Dover, solicitor for relator.

S. C. Biggs, Toronto, solicitor for respondent.

APRIL 12TH, 1902.

C. A.

**MACLAUGHLIN v. LAKE ERIE AND DETROIT
RIVER R. W. CO.**

*Patent for Invention—Contract—Construction of—License—Right to
Alter or Vary Patented Article — Main Consideration for
License may be Proved, where not Inconsistent with Considera-
tion Stated.*

Appeal by defendants from judgment of MEREDITH, C.J., (2 O. L. R. 190), in favour of plaintiffs in action to restrain the infringement of a patent air brake invented by plaintiff MacLaughlin, who had assigned the patent to the plaintiff company, and for damages for infringement and misrepresentations made by employees of defendants respecting the brake.

W. Cassels, K.C., and A. W. Anglin, for defendants.

J. H. Rodd, Windsor, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) held, ARMOUR, C.J.O., dissenting, that upon the proper construction of the agreement (set out in the report in 2 O. L. R.), the defendants were justified in making certain important changes in the mode of construction of the brake and in using the brake so altered, whether or not they were using and claiming to use it as the plaintiff MacLaughlin's invention and so describing it.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiffs.

Blake, Lash, & Cassels, Toronto, solicitors for defendants.

BRITTON, J.

APRIL 14TH, 1902.

WEEKLY COURT.

RE SALTER AND TOWNSHIP OF BECKWITH.

*Municipal Corporation — By-law—Local Option—Posting in Public
Places—Directions to Voters—Omissions not Cured by R. S. O.
ch. 223, sec. 204.*

Motion by a ratepayer of the township of Beckwith to quash local option by-law No. 328 passed under sec. 141 of the Liquor License Act

G. H. Watson, K.C., for applicant.

J. J. Maclaren, K.C., for corporation.

BRITTON, J.—It was objected that the council did not post up a copy of the by-law at four or more of

the most public places in the municipality. This is a serious objection in view of the facts. The affidavits shew that one copy was put up by Mr. McEwen, and one copy was put up by P. F. Sinclair, who was and is a member of the council; he says he has been informed and believes that five copies of the by-law were duly posted, etc., and that he himself personally posted one copy at Scotch Corners, in said township. Joseph Kidd, who was reeve of the township in 1891, swears as follows:—"Copies of said by-law with said notice appended were posted up in at least five of the most public places in the said township of Beckwith, namely, Franktown P. O., Deany School-house, Prospect P. O., Kemp's blacksmith shop at Black's Corners, Town Hall, Black's Corners, all of which said notices I did personally see. I have also been informed and believe that said by-law with said notice appended was posted at the said Scotch Corners in the said township."

It will be noticed that no time is mentioned. It is not attempted to be shewn who put any of these copies up, or when or by what authority, other than as above stated.

Apparently the matter was not discussed in council or by the councillors, either at or before or after any meeting. It is different in that respect from what appears to have been done in reference to publishing the by-law and notice in a newspaper. Mr. Kidd was active in desiring to get the by-law passed, and is now naturally and properly desirous to have it sustained, and he would (if he could) have given more particulars of these copies, when, by whom, and under what circumstances they were put up. The council apparently gave no authority to put them up, and what is a somewhat singular fact, the active workers for the by-law, while they say the by-law and voting were talked about, do not speak about the copies posted up.

It is also objected that directions to voters in the form of schedule L., as required by secs. 142 and 352 of the Municipal Act, were not furnished to the deputy returning officer. This is important. It is not pretended that this was done, but it is urged that no harm was done, because, if there had been, it would be evidenced by spoilt ballots. I hardly think that is the test. Voters are entitled to the information and direction which the statute provides, and ballots may have been wrongly marked and counted, although in no way spoilt.

It is also urged that the mistake is cured by sec. 204. I cannot say this omission did not affect the result. It perhaps did not. I cannot say, and ought not to be called upon

to say, in the absence of any record by the council of what they did or intended to do in regard to conducting the voting on this by-law in accordance with the principles laid down in the Act, how the result was affected. In so important a matter the council should have acted in carrying out details, and the action should have been recorded. It should not have been left to men, no matter how zealous and willing, to do of their mere motion what they thought necessary, and when the responsible corporate body neglected their duty, a by-law without such formalities as the statute requires in the particulars above mentioned ought not to be forced upon the minority, even if it so happens that in truth the majority of those who voted were really in favour of it.

This by-law, if allowed to stand, disturbs the existing order of things in a township as distinguished from all the other townships in the same county, and cannot be repealed for three years. The quashing of it will not prevent a new by-law being submitted, if the electors desire it and the council pass it, and if such a by-law is again submitted, it should be done with such care on the part of the council to comply with the statutory requirements that the will of the electors when once announced shall prevail.

These objections are fatal, and the by-law should be quashed with costs to be paid by the township, but the applicant is not to be allowed any costs upon the other objections on which his motion fails.

There are many affidavits in regard to the qualifications of voters. These affidavits are quite incorrect, although no doubt honestly made by deponents upon information and belief. Costs of these are not allowed against the township.

Colin McIntosh, Carleton Place, solicitor for applicant.

J. S. L. McNeely, Carleton Place, solicitor for corporation.

BRITTON, J.

APRIL 14TH, 1902.

CHAMBERS.

REX EX REL. TOLMIE v. CAMPBELL.

Municipal Corporation—Election of Reeve—Voter Voting more than Once—Majority—Presumption as to Voter's Receiving a Ballot Paper after having once Voted.

Application by relator for order setting aside election of respondent D. Campbell as reeve of the township of Aldborough, in the county of Elgin, on the ground, amongst others, that each of thirty or more electors received a ballot

paper and voted for reeve at more than one polling place in the township at the election.

C. St. Clair Leitch, Dutton, for relator.

E. E. A. DuVernet, for respondent.

BRITTON, J., held, following *Woodward v. Sarsons*, L. R. 10 C. P. 744, that the general principle to guide the courts in such cases is, that the election should be set aside if a Judge, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate of their choice; he also held that there is not, in this case, reasonable ground for believing that the result would be different if all illegal votes could be struck off. There being no actual proof in this case that more than four persons voted more than once, it cannot be presumed, as against the respondent, that every elector who received a second ballot paper after having once voted actually deposited it in favour of respondent.

Motion dismissed, but without costs, as the facts were somewhat unusual, and as there was possibly double voting on both sides.

C. St. Clair Leitch, Dutton, solicitor for relator.

J. D. Shaw, Rodney, solicitor for respondent.

APRIL 14TH, 1902.

DIVISIONAL COURT.

SLINN v. CITY OF OTTAWA.

Municipal Corporation — Railway Embankment — Damages to Adjacent Property from Water caused by a Freshet—Liability of Corporation.

Motion by plaintiff to set aside judgment of nonsuit, and for new trial. Action in the County Court of Carleton to recover damages for injuries alleged to have been sustained by plaintiff, who carries on a bakery business on lots 16, 17, and 18 on the west side of Creighton street in Rideau ward in the city of Ottawa. At the rear of plaintiff's property there has been for a number of years, along the side of the Rideau river, a high embankment, upon which is the track of the Canadian Pacific Railway Company, and which has protected the adjacent property from being flooded in the spring of the year. The defendants O'Leary and Robillard, contractors, in the year 1899, constructed a section of the main drain in the ward, and in carrying the drain under the embankment, negligently, as alleged, left a

large excavation or opening in it, through which water flowed and caused the damage.

A. E. Fripp, Ottawa, for plaintiff.

G. F. Shepley, K.C., for individual defendants.

J. H. Moss, for defendant corporation.

The judgment of the Divisional Court (BOYD, C., FERGUSON, J., ROBERTSON, J.) was delivered by

FERGUSON, J.—The trial Judge having dispensed with the jury and grappled with the whole case himself, the question is not whether there was evidence to go to a jury, but whether the conclusion of the Judge was correct. After a persual of the evidence I am of opinion that the water that did the injury did not come through the cutting made under the railway in the construction of the sewer by defendants, but was water that flowed over the railway dyke owing to a freshet, and in such a case the defendants are not liable.

Appeal dismissed with costs.

A. E. Fripp, Ottawa, solicitor for plaintiff.

Christie & Greene, Ottawa, solicitors for individual defendants.

Taylor McVeity, Ottawa, solicitor for corporation.

APRIL 10TH, 1902.

C. A.

PENNINGTON v. HONSINGER.

*Account—Items—Sale under Chattel Mortgage—Questions of Fact—
Appeal—Reversal of Findings.*

Appeal by defendants from order of a Divisional Court reversing order of FERGUSON, J., upon appeal from a Master's report.

Action for an account of dealings of defendants with property included in certain chattel mortgages made by plaintiffs. The property was brought to a sale under all the mortgages, conducted by defendant Honsinger, with the assent of defendant Baird. After the sale the former acquired all the rights and interests of the latter under his mortgages, and the proceeds of the sale, so far as they might be applicable to discharge and satisfy them.

The questions at issue were: (1) The right of defendant Honsinger to debit plaintiff with (a) \$200 paid to discharge a distress upon the mortgaged chattels for rent of the farm on which they were kept; (b) the bailiff's charges, \$20.76; (c) \$100 for costs of a replevin action arising out of the

seizure; (d) a number of small charges for the maintenance of the mortgaged chattels. (2) Whether the defendant Honsinger was chargeable with the price of several of the chattels offered at the sale.

J. A. Robinson, St. Thomas, for appellants.

W. K. Cameron, St. Thomas, for plaintiff.

OSLER, J.A., delivered the judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) affirming the decision of the Divisional Court, after an examination of the conflicting evidence, holding that it was open to the Court below to form their own conclusions and to overrule the Master's finding and the order affirming them.

J. A. Robinson, St. Thomas, solicitor for appellants.

McLean & Cameron, St. Thomas, solicitors for respondents.

BOYD, C.

APRIL 15TH, 1902.

TRIAL.

BROWN v. CITY OF HAMILTON.

Municipal Corporation — By-law—Prohibiting Fireworks in City—Discretionary with Corporation—Non-intervention by Corporation as to Enforcement is mere Non-feasance—Costs—Rule 373.

Action for damages for the permanent loss of the use of plaintiff's left eye, owing to the negligence of defendants, who, he alleges, contrary to sec. 34 of their by-law No. 30, allowed and licensed an unlawful and dangerous display and use of fireworks on the market square, and at the City Hall, and on the steps of the latter, and the streets and sidewalks. The plaintiff was travelling in a street car when he was struck by a portion of explosive substance, a roman candle, which was being set off by some one in a procession. The by-law was passed under the authority conferred by the Municipal Act

J. G. Farmer, Hamilton, for plaintiff.

F. Mackelcan, K.C., for defendants.

BOYD, C.—The passing of the by-law by the defendants was an exercise of the delegated sovereign power intrusted to municipalities—a function the exercise of which is discretionary. The city is free to enact or not to enact, and having enacted may repeal without any responsibility which can be examined by the Courts. Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement. That rests with any one and every one in

the locality who desires to have it enforced: *Back v. Holmes*, 56 L. T. 713. But, like all prohibitory enactments, if the popular sentiment is not in its favour, it will prove a dead letter. Such appears to be the fate of this by-law, for, though enacted in 1874, it has been periodically violated. The corporation remained quiescent. A different question would have arisen if the city authorities had sanctioned or licensed the display of fireworks in the streets; in the case of a public nuisance that might be regarded as a case of misfeasance as in *Forget v. Montreal*, 4 S. C. R. 77. In the present case, however, the non-intervention of the corporation is at the highest mere non-feasance, and it is well settled that mere non-feasance is not actionable. The argument of plaintiff is that when the city passed the by-law a cause of action arose and that the by-law was systematically disregarded, to the knowledge of the officers of the city, and that no steps were taken to enforce it. This novel proposition has its sole sanction in the decision of the Maryland Courts, but is opposed to all other American and English authorities. Very much in point are the observations of Gwynne, J., in *Montreal v. Mulcair*, 28 S. C. R. 469.

Action dismissed with such costs as would be taxed had the point been dealt with on demurrer under Rule 373.

Lee, Farmer, & Stanton, Hamilton, solicitors for plaintiff.

Mackelcan & Counsell, Hamilton, solicitors for defendants.

BRITTON, J.

APRIL 15TH, 1902.

TRIAL.

WILSON v. HOWE.

Work and Labour—Statute of Limitations—Claim against Estate of Deceased Person—Corroboration.

Action by a son-in-law of Marvin Howe, deceased, against his executors, to recover \$650 for work done and articles sold to Howe prior to his decease on 17th May, 1895. The plaintiff alleges that payment was not to be demanded, but deceased was to keep the money in trust to apply it on the purchase of a house for plaintiff or his wife. The plaintiff also claimed \$100, part of the consideration to his wife for signing certain documents in connection with the estate.

J. P. Mabee, K.C., and J. C. Makins, Stratford, for plaintiff.

J. Idington, K.C., and R. S. Robertson, Stratford, for defendants.

BRITTON, J.—The plaintiff's evidence was sufficiently corroborated. *Re Ross*, 29 Gr. 385, is distinguishable. Deceased was not a trustee. This is not the case of a deposit of money for safety until demand as in *Tidd v. Overell*, 3 Ch. D. 154. There was a debt here due to plaintiff of \$450, but it is barred by statute. The defendants are not indebted to plaintiff for the \$100 claimed. The defendants are indebted to plaintiff in the sum of \$5 paid into Court in respect of the claim for work done in 1899, and he is entitled to that sum, but the action is dismissed with costs.

BRITTON, J.

APRIL 17TH, 1902.

TRIAL.

BENTLEY v. MURPHY.

Ship—Contract to Sell—Specific Performance—Discretion—Balance of Purchase Money Unsecured—Damages.

Action tried at Toronto brought for specific performance of a contract for the sale of the steamer "Island Queen."

L. G. McCarthy and A. M. Stewart, for plaintiffs.

R. T. Walkem, K.C., and H. T. Kelly, for defendant Craig.

T. Mulvey, for defendant Murphy.

BRITTON, J.—At the time of sale the defendants were the real owners of the steamer, and it is clear that the contract of sale was made by defendant Murphy on behalf of himself and his co-defendant Craig. It cannot be said that any advantage was taken of the vendors by reason of the balance of purchase money not being agreed to be secured by mortgage. The offer by letter to purchase was good under the Merchant Shipping Act of 1854, though before that Act it would be void because not reciting the certificate of registration: *Hughes v. Morris*, 2 DeG. M. & G. 349. But it is not a case for specific performance, a discretionary remedy which should be cautiously applied. In this case, though no fraud is shewn, the contract was not an ordinary one. It was close bargaining on the plaintiffs' part, paying only part of the purchase money, and giving no security for balance. Vessels are subject to marine risk and other casualty. The plaintiffs are seeking equity, but are not prepared to do equity by giving a mortgage, and though not required so to do by contract, it is a valid reason why specific performance should be refused: *Mortloch v. Buller*, 10 Ves. 292; *Robinson v. Harris*, 21 S. C. R. 39. Judgment for plaintiffs for damages. Reference to Master in Ordinary.

APRIL 17TH, 1902.

DIVISIONAL COURT.

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

*Drainage Referee—Official Referee—R. S. O. ch. 226, secs. 88, 89—
1 Edw. VII. ch. 30, sec. 4—Arbitration Act, sec. 29.*

The Drainage Referee is an Official Referee within the meaning of sec. 29 of the Arbitration Act.

Appeals by plaintiff in each case from orders of Meredith, C.J., staying proceedings and refusing to direct references to J. B. Rankin, Drainage Referee, as a Referee under sec. 29 of the Arbitration Act. There was pending a drainage matter commenced by notice served and filed pursuant to the Municipal Drainage Act and amendment, 1 Edw. VII. ch. 30, sec. 4, wherein the plaintiffs in these actions were asking for damages and other relief, which would be heard in due course before the Drainage Referee. The plaintiffs alleged that the questions arising in this action, as well as those in the drainage matters, had each to do with the same lands and locality, which required local inspection and investigation, and a special or scientific knowledge, in order that a proper adjudication might be made, and they therefore applied to a Judge in Chambers for an order of reference. The Chief Justice refused the references on the ground that the Drainage Referee is not an Official Referee within sec. 29, and stayed proceedings until the conclusion of the drainage matter, so that thereafter, if necessary, the plaintiffs could proceed in these actions as to questions raised outside the scope of sec. 4 of the Act of 1901.

G. H. Watson, K.C., for plaintiffs.

J. H. Moss, for defendants.

The Judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

BRITTON, J.—Before the passing of ch. 30 there would have been no difficulty, as R. S. O. ch. 226, sec. 94, gave the Court or Judge power to refer, but that action has been repealed by sec. 4; and under the Arbitration Act, if the parties agree, the question may be referred to a special referee. Here they do not agree, but I think that the Drainage Referee is a referee within sec. 29. There is no statutory definition of Official Referee, but sec. 141 of the Judicature Act names persons by their office who are Official Referees, and the Drainage Referee is not there named.

The Drainage Act, R. S. O. ch. 226, secs. 88 and 89, makes the Drainage Referee (1) an officer of the High Court, (2) confers upon him all the powers of an Official Referee under the Judicature and Arbitration Acts. Official Referee is only "official" in the sense of being an officer of the High Court. The Drainage Referee, being such an officer, with all necessary powers, is an Official Referee for the purposes and within the meaning of the Arbitration Act. Rule 12 makes all officers auxiliary to one another. See also sub-sec. 22, sec. 8 of the Interpretation Act. I think therefore that the Drainage Referee being specially vested by sec. 89 of the Drainage Act with the powers of Referee under the Arbitration Act, the appeal should be allowed, and the case referred to him. Costs of appeal to plaintiffs in any event.

Moncrieff, Wilson, & Craig, Petrolia, solicitors for plaintiffs.

Cowan & Towers, Sarnia, solicitors for defendants.

MACMAHON, J.

APRIL 17TH, 1902.

TRIAL.

CHRISTIAN v. POULIN.

Deed of Land—Undue Influence—Full Disclosure of Facts.

Action tried at Ottawa brought to set aside a deed of land made by plaintiff to his son-in-law, defendant S. R. Poulin, or in the alternative that said defendant be ordered to pay plaintiff \$60 a month, and discharge or satisfy a mortgage for \$3,000 on the land in question.

W. H. Barry, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants.

MACMAHON, J.—The plaintiff knew perfectly well what he was doing, and full explanation was made to him at the time he signed the deed, and he knew defendant S. R. Poulin had to assume the mortgage on the property, and pay arrears of interest and taxes, and that, besides, S. R. Poulin had also lent a large sum of money, and that therefore there could not be any payment to plaintiff per month, for there was nothing out of which to pay it. Action dismissed with costs, which if not paid may be added to claim of defendant S. R. Poulin as a disbursement. Amount of interest and taxes may be regarded as a first charge on the land.

APRIL 12TH, 1902.

C. A.

ANDERSON v. MIKADO GOLD MINING CO.

Master and Servant — Violation of Rule by Servant — Master not Responsible for Injury Resulting therefrom—Onus on Servant to Shew Waiver of Rule by Master—Mine—Cage for Hoisting Tools—Ladders for Ascent and Descent of Workmen—Injury to Servant Using Cage.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiffs, for \$2,250, in action by the widow and infant children of Oscar Anderson, deceased, for damages for injuries which caused his death. The deceased was engaged, with three others, to widen a drift at the bottom of 240 foot level of the defendants' mine, and was paid by the foot. The defendants owned and supplied the necessary tools, and agreed to transport them to and from the surface, where they had to be sharpened. Anderson was ascending, with three others, by the steam lift, when one of the tools, a steel 2 or 3 feet long, which was lying on the bottom of the cage, became projected a little beyond it, and coming in contact with one of the shaft timbers, struck Anderson and threw him between the cage and the timbers. Before the cage could be stopped he was so badly injured that he died in the hospital at Port Arthur 45 days afterwards. The trial Judge found the only way by which the tools were taken up to the surface was the cage, which had no guards and no devices for securing the steels while it was ascending with them, and that the men, as well as the other employees, and the manager, habitually went up and down by the lift, and disregarded, with the knowledge of the mine officers, the notice not to do so; that the ladders furnished by the defendants were defective, and did not comply with the Mines Act, sec. 69 (17); that deceased had not been warned not to use the lift, and had not said he would take all risks, and had not been guilty of contributory negligence; that the cage was unsafe; and that defendants had been guilty of negligence.

A. B. Aylesworth, K.C., and N. W. Rowell, for defendants.

R. C. Clute, K.C., and A. R. Clute, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER and MOSS, JJ.A.) held that the death of the deceased arose from his own act in going up by the cage in violation of the rule of the defendants, and they therefore could not be held responsible: *Senior v. Ward*, 1 E. & E. 385. The onus is on the servant

to shew that a rule, the application of which he wishes to get rid of, has been waived or abandoned by a course of conduct inconsistent with its existence, known to and tacitly or expressly assented to by the employer, and the onus has not been satisfied in this case. The cage was not constructed nor intended for the use of the workmen, but a safe, convenient, and usual way was provided for them by means of ladders. The injury which the unfortunate deceased met with arose from his deliberate disobedience of the rule, and it ought to have been held that on this ground the plaintiff had no right of action. Appeal allowed with costs and action dismissed with costs.

Boyce & Draper, Rat Portage, solicitors for plaintiff.

Moran & McKenzie, Rat Portage, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

PEAREN v. MERCHANTS BANK OF CANADA.

Malicious Prosecution — Reasonable and Probable Cause — Bank — Customer—Warehouse Receipts — Charge of False Statements made therein as to Grain—Nonsuit on Undisputed Facts.

Appeal by defendants from order of a Divisional Court setting aside judgment of nonsuit of FALCONBRIDGE, C.J., and directing a new trial of action for damages for malicious prosecution. The plaintiff was a member of the firm of Pearen Bros., millers, etc., Brampton, and had had an account with defendants for about 10 years before the proceedings complained of. Three charges were made against plaintiff by defendants. The first was that he had alienated between August 23rd, 1899, and March 2nd, 1900, certain wheat covered by warehouse receipts issued by him in favour of defendants. The police magistrate dismissed this charge, but committed plaintiff for trial on the second charge, viz., of withholding possession of the wheat from defendants, and the County Judge subsequently tried and acquitted him. The third charge was that plaintiff, between 2nd August, 1899, and 12th February, 1900, did issue warehouse receipts to defendants and wilfully make false statements therein, contrary to sec. 578 of the Criminal Code, and sec. 76 of the Bank Act. The magistrate dismissed this charge. The plaintiff then brought this action. The trial Judge held that absence of reasonable and probable cause was not shewn in respect of the first charge; and as to other charges the plaintiff, not having obtained the fiat of the Attorney-

General for the production of the information and the record of acquittal, and the clerk of the peace refusing to produce them without, the Judge held that the plaintiff had not established his case. The Divisional Court were of opinion that there were disputed facts upon which it was the province of the jury to pass, and until the facts were found the Judge was not in a position to determine the question of want of reasonable and probable cause.

W. Nesbitt, K.C., and A. McKechnie, Brampton, for defendants, appellants.

G. H. Watson, K.C., and J. F. Hollis, Brampton, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) held that the undisputed facts disclosed in the evidence (examined and referred to at length by the Chief Justice and OSLER, J.A.) shewed reasonable and probable cause for preferring all the charges, and therefore there should be a nonsuit as to the whole case, and it was unnecessary to consider the other questions raised.

Appeal allowed with costs and judgment of FALCONBRIDGE, C.J., dismissing the action with costs, restored.

Justin & Hollis, Brampton, solicitors for plaintiff.

McKechnie & Heggie, Brampton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

RE TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.

Assessment and Taxes—Equalization of Assessments—Appeal—County Judge—Limitation of Time within which Judgment to be Delivered—Imperative Enactment—R. S. O. 1897 ch. 224, sec. 88, sub-secs. 1, 7.

Appeal by the county corporation from order of a Divisional Court (FALCONBRIDGE, C.J., STREET, J., 22 C. L. T. Occ. N. 48), dismissing an appeal from an order of BOYD, C., in Chambers, refusing to prohibit the Judge of the County Court of Simcoe from proceeding with the hearing and determination of an appeal by the township corporation from the equalization by the county council of the assessment rolls for the year 1900 of the various municipalities within the county. The motion was made on the grounds that the township had not duly authorized the appeal, because a by-law was necessary for the purpose and one had

not been passed, and that the County Judge had no jurisdiction to proceed with the hearing of the appeal after the 1st August, sec. 88, sub-sec. 7, of the Assessment Act, providing that judgment shall not be deferred after that date.

C. E. Hewson, Barrie, and A. E. H. Creswicke, Barrie, for county corporation.

H. Lennox, Barrie, for township corporation.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) unanimously held that the section was imperative.

OSLER, J.A.—The object aimed at by the equalization of the assessment rolls is to correct, as nearly as may be, eccentricities and unreasonable differences in assessments as taken in the various local municipalities, so that the incidence of the county rates may be fairly distributed over the whole of the assessable property in the county. The aggregate of the valuation of the various local municipalities appearing upon their assessment rolls as finally revised and corrected is not to be disturbed; what is taken or deducted from the valuation of one is to be placed upon and distributed over the valuations of another or the others, and thus the whole assessment of the county is equalized. The proportion which each municipality is to contribute towards the “county rate” is therefore ascertained by the county by-law, to be passed when and not until the rolls have been equalized by the council: secs. 87-94. For this purpose, as it would appear from sec. 88, the council need not await the result of an appeal. The rolls for the current financial year could not be utilized, because they may not be finally completed until 1st August, and the township clerk has 90 days thereafter in which to send copies of them to the county clerk. Therefore, as sec. 87 provides, it is the revised rolls for the preceding financial year which are to be examined and equalized, and it is the amount of the property assessed and valued in these rolls as equalized, which forms the basis on which the apportionment of the county’s requirements among the various local municipalities is made: sec. 91. The appellants rely upon sec. 8, sub-sec. 2, of the Interpretation Act, which enacts that the word “shall” shall be construed as imperative, but that is subject to the qualification of sec. 7 (1), “except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression, or clause, is inconsistent with the context.” It rests upon the respondents to shew that the word “shall” is to be read in sec. 88, sub-secs. 4 and 7, in

the permissive sense; and they have failed to do so. The only substantial argument is, that the Legislature has given an appeal which may become abortive if, by reason of delay of the parties, or of the time occupied in hearing it, or the delay of the Judge in giving judgment after argument, it is not disposed of by the 1st August. But the words of the sub-section are in the emphatic negative form, and there is an excepted case, "except as provided in secs. 58-61," in which it seems to be implied that judgment may be deferred. The force of this exceptive language as aiding the construction of what follows is not weakened by the fact that it may not be very easy to apply the exception. Then, as to the argument from inconvenience. The rolls have been in fact equalized by the county council. If the appeal drops, the council proceeds upon its own decision, which operates only upon the taxation of the present year. There is no such serious inconvenience involved in the loss of the appeal for a single year as to warrant the Court in giving the language of sub-sec. 7 less than its full force, and treating it as otherwise than an absolute prohibition against continuing the appeal after the date specified as the last day for giving judgment thereon.

Appeal allowed with costs here and below, and order made for prohibition.

Lennox, Ardagh, Cowan, & Brown, Barrie, solicitors for township corporation.

Hewson & Creswicke, Barrie, solicitors for county corporation.

APRIL 12TH, 1902.

C. A.

MYERS v. SAULT STE. MARIE PULP AND PAPER CO.

Master and Servant—Injury to Servant—Dangerous Machinery—Unsecured Ladder—Removal of, by other Workman causing Injury to Fellow-workman does not Relieve Master from Liability—Negligence — Proper Precautions for Guarding Machinery a Question for Jury—Excessive Damages.

Appeal by defendants from judgment for plaintiff for \$4,500, entered by FALCONBRIDGE, C.J., upon the answers of a jury to seven questions submitted to them in action for damages. The plaintiff J. W. Myers is the father and next friend of the plaintiff Harry Myers, a lad 19 years old, who was employed by defendants in attending to a dryer and wet press, and whose duties consisted in taking pulp off the press-rolls,

tying it up, sweeping the floor, and keeping the machines running. In getting up to the press-roll the boy went up by a ladder with five steps, reaching to about a foot from a narrow board, which formed a platform for him to stand on, over the press. The press was close to a large moving cog-wheel, and at a quarter past 12 o'clock, midnight, on the 19th August, 1900, the lad, who had been taking off pulp, started to go down by the ladder, when a workman, named O'Meara, pulled it away, and the boy fell. His leg swung into the cog-wheel, and had to be amputated two days later. The jury, after visiting the premises, found that the boy had not been guilty of negligence; that the defendants were negligent in not guarding the machinery, which was dangerous, and in not fastening the ladder to the floor; and that, had the machinery been properly guarded, the boy would not have been injured, notwithstanding the pulling away of the ladder; and awarded \$4,000 damages to the boy, and \$500 damages to his father.

W. R. Riddell, K.C., and J. E. Irving, for defendants.

W. M. Douglas, K.C., for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the findings of the jury as to negligence were amply supported by the evidence. The defendants were bound by common law to take all reasonable precautions for safety of their workmen, and it was for the jury to say what were those precautions: *Smith v. Baker*, [1891] A. C. 325; *Webster v. Foley*, 21 S. C. R. 580. The defendants were also bound by the Factories Act to guard dangerous parts of the machinery. The jury were warranted in their finding as to the ladder, and that the wheel was dangerous and not securely guarded; and the intervention of the workman in wrongfully taking away the ladder did not relieve defendants from the consequences of their negligence. According to *Englehart v. Farrant*, 1 Q. B. D. 240, the question whether the negligence of defendants was an effective cause of the workman's injury was a question for the jury, and they had by the 3rd and 4th answers in effect so found, and properly so found, and upon the law, the intervention of the workman did not relieve the defendants from the consequences of their negligence: *Illige v. Goodwin*, 5 C. & P. 190; *Clark v. Chambers*, 3 Q. B. D. 325; *The B——*, 12 P. D. 58. *Mann v. Ward*, 8 T. L. R. 699, cannot be regarded in view of *Englehart v. Farrant*, *supra*. The damages, however, were excessive. If plaintiffs elect to reduce the damages to \$2,000 and \$100 respectively, the appeal is dismissed with costs. Otherwise new trial directed

with costs of appeal to defendants and costs of last trial to abide the event.

Hearst & McKay, Sault Ste. Marie, solicitors for plaintiffs.

Hamilton, Elliott, & Irving, Sault Ste. Marie, solicitors for defendants.

APRIL 11TH, 1902.

C. A.

FISHER v. BRADSHAW.

Chattel Mortgage—Prior Agreement to Give—If Valid, Mortgagees may claim under it notwithstanding Defect otherwise Fatal in Mortgage.

Appeal by defendants from judgment of BOYD, C. (2 O. L. R. 128), in favour of plaintiff in an interpleader issue. The goods in question were seized under an execution upon a judgment recovered by defendants Bradshaw & Co., against Benor, Taylor, & Co., merchants, Alliston. The other defendants are also execution creditors. The plaintiff claims under a chattel mortgage dated 23rd January, 1901, executed by Benor, Taylor, & Co., pursuant to agreement dated 1st June, 1899, which was given pursuant to R. S. O. ch. 148, sec. 11, and duly registered. The mortgage was afterwards registered, and the Chancellor held that the Act did not operate to merge the registered agreement in the subsequently executed and registered mortgage, and therefore, as the affidavit of bona fides, made seven months before in the agreement, was regular, a defective affidavit of bona fides in the mortgage did not vitiate it. The latter affidavit did not state that the mortgagor "is justly and truly indebted" in the sum of \$2,500.

G. C. Gibbons, K.C., A. J. Russell Snow, and L. F. Stephens, Hamilton, for defendants.

W. A. J. Bell, Alliston, for plaintiff.

Moss, J.A.—Under sec. 11 of the Bills of Sale and Chattel Mortgage Act the plaintiff could have maintained under the agreement his claim to the goods, if before the subsequent execution of the chattel mortgage the seizure had been made. Absolute good faith and a bona fide advance having been established by the evidence and found by the Chancellor, the creditors can claim no higher rights in respect of the property covered by the agreement than can their debtor. The object of 59 Vict. ch. 34, from which comes sec. 11 and following sections, was to put an end to secret agreements. By the registration of the agreement in

question ample information was given to creditors, and there is no reason why the holder of it should not have the benefit of it as against an execution or other creditor to the same extent as if he held the legal property in the goods. The question in the issue is whether the goods are liable to be taken in execution as being the debtor's, and the creditor suffers no harm from the production of an agreement valid under the Act: *Edwards v. English*, 7 E. & B. 564; *Shingler v. Holt*, 7 H. & N. 65; *Block v. Drouillard*, 28 C. P. 107. There is no evidence of any intention to give up the agreement, and it must not be held that the mortgage is void as against creditors, but good for the purpose of superseding the agreement and thereby letting in the executions. There is no objection to the plaintiff acting in good faith holding more than one security for the goods: *Boldrick v. Ryan*, 17 A. R. 253. It is sufficiently shewn that plaintiff was entitled to take the security to himself and to make the affidavit of indebtedness to himself, as he has done. As between him and Mary Coley he is responsible to her for the money. She joined in making a cheque for the money, and thereby assented to the transaction and to the taking of the security as it was done, and that is sufficient for the creation of the relationship of debtor and creditor between Benor and Taylor and the plaintiff.

ARMOUR, C.J.O., and MACLENNAN, J.A., concurred.

Appeal dismissed with costs.

W. A. J. Bell, Alliston, solicitor for plaintiff.

Lees, Hobson, & Stephens, Hamilton, solicitors for defendants.

FALCONBRIDGE, C.J.

APRIL 17TH, 1902.

WEEKLY COURT.

TAYLOR v. MACFARLANE.

Intoxicating Liquors — License and Goodwill of Hotel Business—Devise by Owner of Business or Sale after his Death—License does not Pass—Value of License Deducted from Purchase Money—Renewal by Devisee for Life Enures to her Benefit—Interest of Devisee for Life is Exigible.

Special case stated for the opinion of the Court as to whether Maggie Macfarlane, widow and executrix of Francis Macfarlane, was the owner of a license to sell liquor, and the goodwill of the hotel business carried on by her husband, at the time of the sale of the business to one O'Leary. The testator devised the hotel to his widow for her widowhood for the benefit of herself and four children. The widow

renewed the license in her own name each year after the death of her husband in 1896, but the business was not successful, and the question was, what was her interest in the license or the goodwill of the business, and, if she had any, whether it was exigible.

C. H. Ritchie, K.C., for plaintiffs.

A. C. McMaster, for defendants adult beneficiaries and executors.

W. E. Raney, for defendant company.

D. L. McCarthy, for official guardian.

FALCONBRIDGE, C.J.—No money of the estate went into the business which the widow carried on for her own benefit. There is no provision in the statute allowing an executor or trustee to carry on the business, which, with the license, is personal to the holder thereof: see the Liquor License Act, R. S. O. ch. 245, secs. 11, 12, 16, 37, 40. There is no pretence that the business was the property of the estate of the testator. There can be no conflict of interest and duty in the widow's position, inasmuch as there is no possibility of the beneficiaries getting any advantage out of it; nor is there any constructive trust: I refer to Theobald, 4th ed., 604; Allen v. Furness, 20 A. R. 34; Lambe v. Eames, L. R. 6 Ch. 597; Lister v. Stubbs, 45 Ch. D. 1; East v. O'Connor, 2 O. L. R. 355.

The license system in England is so different from ours, that the English authorities and cases have, for the most part, no application.

The following is the result: (1) At the time the agreement for sale was entered into with O'Leary, the license to sell liquors and the goodwill of the hotel business belonged to the defendant Margaret MacFarlane personally. (2) She is entitled under the will to the income during widowhood exclusive of the value of the license and goodwill. The two infant defendants are entitled to maintenance out of the income until 21 years of age, and until then the income should be divided as directed in Allan v. Furness, 20 A. R. 34. If defendant Macfarlane marry again she will be entitled to receive \$1,000, and balance of estate to be divided equally among her four children. (3) Reference to ascertain portion of purchase money representing value of license and goodwill of the business. (4) An execution creditor of defendant M. Macfarlane could reach her interest by procuring the appointment of a receiver. (5) Defendants the National Trust Company to distribute the money and securities according to the trusts, having regard to these findings. No costs. If any costs not provided for, they are to be paid by trust company out of the fund generally.

APRIL 19TH, 1902.

DIVISIONAL COURT.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Contract—Delivery of Deed in Escrow—Non-performance of Condition—Option—Trust—Deposit—Form of Action.

Appeal by defendants the Pioneer Trading Corporation from judgment of ROBERTSON, J., *ante* 76.

W. H. Blake, for appellants.

J. K. Kerr, K.C., for plaintiff.

The judgment of the Court (BOYD, C., MEREDITH, J.) was delivered by

BOYD, C.—The finding, undisputed and indisputable, that the money deposited with the bank was subject to a condition yet unfulfilled, appears to be conclusive of the case. That is *the* issue: was this money wrongfully withheld by the bank? That it was so may render the wrongdoer liable to an action either in damages or for the price of the land, but not liable in respect of this particular sum deposited with the bank—so that it should be recovered *in specie* or as if earmarked as a trust fund. The judgment for payment out of this particular money as a judgment *in rem* has gone beyond the limits of equity as recognized and administered by the Courts. This was not set apart by the purchaser to answer the price of this land absolutely—but only upon an unfulfilled condition. No lien, therefore, upon the doctrine of reciprocal trusteeship of the land and the money, could arise as to or attach upon this particular fund. It is to be paid out only when and as the purchaser became satisfied—though this may be, in the circumstances, an arbitrary and even unreasonable term, yet a man may do what he will with his own. No doubt upon a judgment against the Pioneer Trading Corporation this money might be seized or garnished by a creditor—but, other than in some such way as this, specific delivery of this money in the hands of the bank could not be obtained by course of law. Had the action been framed so as to claim a lien upon this money, that would have involved the larger question of specific performance of the option or agreement for sale, and, as the land is in British Columbia, difficult questions as to jurisdiction in the Ontario Courts would present themselves, which have been avoided in the present more limited statement of claim. The action should therefore be dismissed as against the trading corporation without costs. This because the case of the corporation in seeking to approbate and reprobate the option (or it may be the purchase) is not to be encouraged.

APRIL 19TH, 1902.

DIVISIONAL COURT.

REX EX REL. ROBERTS v. PONSFORD.

Quo Warranto—Notice of Motion for Tuesday 24th February, by Mistake for Tuesday 25th February, Valid—Amendment.

Order of ROBERTSON, J., *ante* 223, affirmed by a Divisional Court (BOYD, C., FERGUSON, J., MEREDITH, J.).

APRIL 10TH, 1902.

C. A.

RENNIE v. QUEBEC BANK.

Chose in Action—Assignment of—Notice of—Partnership—Interest of Partner — Sheriff — Execution—Banks—Creditor's Action on Behalf of Himself only.

Appeal by plaintiffs from order of a Divisional Court (2 O. L. R. 303) affirming judgment of MEREDITH, C.J., dismissing action to set aside an assignment by Hugo Block of a certain debt owing to him by the firm of Reid, Taylor, & Bayne, in which he was a silent partner, to the Quebec Bank. The plaintiffs are husband and wife. The husband is a judgment creditor of Hugo Block, and alleges that the assignment was a fraudulent preference. The wife claimed to be the owner of the interest of Block in the partnership assets, by virtue of a bill of sale from the sheriff of Toronto to her, made under the execution placed in his hands, on the 10th July, 1896, under the judgment held by her husband.

J. O'Donohoe, K.C., and W. Norris, for plaintiffs.

A. B. Aylesworth, K.C., and H. G. Kingstone, for defendants.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) held (1) as to the action of the male plaintiff, that "debts" are not included in the expression "goods, wares, and merchandise," as used in the Bank Act, 53 Vict. ch. 31, and therefore there was nothing to prevent the bank from taking an assignment from Hugo Block of the debt due to him from his co-partners as security for the debt which he owed the bank, and the effect of it was to vest the property in the debts assigned, in the bank, and notice was not necessary to its validity, but was only necessary to prevent defences of set-off to the debts assigned arising after the assignment and before notice, and as against a subsequent assignee: R. S. O. 1887 ch. 122, secs. 11, 12. The sheriff could not have seized the book debts or goodwill, though

he could have seized the assets; but he did not do so, and all were sold and disposed of in due course, and the male plaintiff lost therefore any benefit which he might have derived from any seizure of the assets of the firm and the sale by the sheriff of the interest of Block therein; (2) and as to the female plaintiff nothing passed to her under the bill of sale from the sheriff: *Holman v. Smith*, 35 Ch. D. 436.

Appeal dismissed with costs.

J. O'Donohoe, Toronto, solicitor for plaintiffs.

Kingstone, Symons, & Kingstone, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

JOHNSTON v. MACFARLANE.

Covenant — Restraint of Trade — "Not to Carry on, Engage, or be Interested, Directly or Indirectly, in Canada for One Year" in Business—Giving Advertising Space for Rival Advertisements—Breach.

Appeal by defendant from judgment of BOYD, C., directing a reference to ascertain the damages sustained by plaintiff by reason of a breach of a covenant made by defendant upon a dissolution of his partnership with plaintiff. The parties were mail order merchants in the city of Toronto, and upon the dissolution on 8th September, 1900, they divided the branches of their business, the selling of sweet pea seeds falling to plaintiff's share. The covenant is in the following terms:—"The said Macfarlane covenants with the said Johnston that he will not during the period of one year from the date hereof carry on or engage or be interested, directly or indirectly, within the Dominion of Canada, in the business of selling sweet pea seeds, and that he will not during the said period compete or interfere with the said Johnston in the business of selling the same." The plaintiff alleged that after dissolution defendant gave advice and assistance to a rival concern called the Seed Supply Co., started by defendant's brother, and allowed it to use space in newspapers for which he had large special contracts at reduced rates, taken over from the former partnership. The Chancellor held that by the intervention of the defendant, the Seed Supply Co. were able to get in advertisements at first without cash and at a low rate, which otherwise it could not have done; that, as the company's business was for the season of 1901, it was all important to get its advertisements out in February, and that it could not have taken any initial

step without the active intervention and influence of the defendant, and therefore in that way he was "indirectly," within the meaning of the covenant, engaged in the sweet pea business by helping the Seed Supply Co. to carry it on.

J. W. St. John, for appellant.

J. B. O'Brian, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held, MACLENNAN, J.A., dissenting, that the covenant had been broken. What defendant did was an engaging in the business of selling sweet pea seeds, and was not the less so because the seed supply company paid the necessary disbursements. Good faith and the terms of his covenant required that he should not use the advertising space—the only effective means of interfering with the plaintiff's business—for his own benefit, and he was equally prevented from doing by another that which he could not himself do.

Per MACLENNAN, J.A.—Having regard to *Smith v. Hancock*, [1894] 2 Ch. 377, the judgment below cannot be maintained. The acts of the defendant do not constitute competition or interference with the plaintiff's business, upon the proper construction of the language of the covenant.

Appeal dismissed with costs.

J. B. O'Brian, Toronto, solicitor for plaintiff.

St. John & Ross, Toronto, solicitors for defendant.

APRIL 10TH, 1902.

C. A.

WITTY v. LONDON STREET RAILWAY CO.

*Street Railways — Accident — Medical Evidence Evenly Balanced—
Misdirection—Damages—New Trial.*

Appeal by defendants from judgment of LOUNT, J., in favour of plaintiff upon a verdict of a jury for \$5,500 in action for damages for injuries. The plaintiff was a passenger in a car of defendants on Dundas street. Another car ran into it and threw it across another track, and it was again there run into by another car. The plaintiff alleges that his back and spine are permanently injured.

I. F. Hellmuth and E. C. Cattanaach, for defendants.

W. R. Riddell, K.C., and J. Cowan, Sarnia, for plaintiff.

THE COURT (ARMOUR, C.J., OSLER, MACLENNAN, MOSS, JJ.A.) held that the case upon the medical evidence as to the extent of the injuries was rather evenly balanced, and therefore it was misdirection for the trial Judge to tell

the jury that the medical experts for the defence did not adhere throughout their evidence to the opinion they had at first expressed as to the nature of the plaintiff's disorder and its cause; nor should he have told the jury that perhaps they would be justified in thinking that two doctors who had watched the progress of the plaintiff's health since the accident were better capable of forming a fair estimate of his prospects of complete recovery than those physicians who had not. Remarks such as these are calculated to minimize the evidence adduced by defendants and to dispose the jury not to give it the full consideration or weight to which otherwise they might have thought it entitled. The damages too are very large, and the jury were considerably affected by the charge.

New trial ordered. Costs of trial and subsequent proceedings to abide event. Costs of appeal to defendants.

Cowan, McCarthy, & Towers, Sarnia, solicitors for plaintiff.

Hellmuth & Ivey, London, solicitors for defendants.

APRIL 10TH, 1903.

C. A.

RE VILLAGE OF MARKHAM AND TOWN OF AURORA.

Municipal Corporation—Bonus to Factory—By-law to Secure Removal of Industry—Determination of Proprietor of Established Industry does not make By-law Valid—Time—63 Vict. (O.) ch. 33, sec. 9, sub-sec. (e)—R. S. O. 1897 ch. 223, sec. 396.

Appeal by the village of Markham from order of LOUNT, J., refusing a motion to quash by-laws Nos. 192 and 193 passed by the town of Aurora in the county of York. In 1897 the firm of Underhill & Sisman established a boot and shoe factory in Markham, in the county of York. On January 30th, 1901, the by-laws were introduced. The first by-law granted the said firm a cash bonus of \$10,000 to enable them to purchase land and equip a factory for carrying on their business in the town of Aurora; and the second by-law exempted them from taxes (except school rates) and water rates for ten years. The Judge below held that the case was not within 63 Vict. ch. 33, sec. 9, sub-sec. (e), amending sec. 591 of the Municipal Act, because the firm had decided to remove their business from Markham, and that being notoriously the case (the firm having been in communication with other municipalities) and the respondents, being so informed and believing, were quite within their rights in trying to secure the establishment of the business in their town.

W. E. Raney and A. Mills, for appellants.

A. B. Aylesworth, K.C., and T. H. Lennox, Aurora, for respondents.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) held that the determination of Underhill & Sisman to remove their factory from the village of Markham did not relieve the respondents from the prohibition against passing by-laws granting bonuses to secure the removal of such an industry to Aurora, because that prohibition is by the Act plainly against the passage of a by-law to secure the removal of an industry already established elsewhere in the Province. The determination to remove when come to was not to remove to any particular locality, and the removal to Aurora was made afterwards by reason of the passage of the by-laws. Held, also, that the by-laws, which are *ultra vires*, having been attacked within three months of their registration under sec. 396 of the Municipal Act, the Court should not decline to set them aside. Appeal allowed with costs and by-laws quashed with costs.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for appellants.

T. H. Lennox, Aurora, solicitor for respondents.

APRIL 11TH, 1902.

C. A.

MOORE v. J. D. MOORE CO.

Master and Servant—Injury to Servant—Moving Machinery—Guard—Factories Act—Negligence of Boy of 14 Years—Momentary Inattention—Question for Jury—Age Limit in Criminal Cases does not Apply to Civil Matters.

Appeal by plaintiff from judgment of STREET, J., dismissing action by Adam Moore, an infant 14 years of age (by his next friend), for damages, at common law and under Workmen's Compensation Act, for injuries sustained while at work in defendants' factory in the town of St. Mary's. The plaintiff when straightening some pieces of wood, as directed by the foreman, at the side of a machine called a dove-tailer, put his hand on it to rub off some dust and became entangled in it, and lost one of his arms. At the close of the plaintiff's case the defendants moved for a nonsuit. The jury in answer to seven questions found, that the boy put his hand in the machine above the plate; that the knives of the machine were not, as far as practicable, securely guarded; that defendants were negligent in not further guarding; that the cause of the accident was the

defendants' negligence in not securely guarding, and in the inattention of Ward, the operator of the machine; that the plaintiff had used reasonable care for a boy of his age; and assessed the damages at \$500.

The trial Judge dismissed the action on the ground that the plaintiff had made out no case of negligence on the part of the defendants which caused the accident: *Roberts v. Taylor*, 31 O. R. 10; *Beven on Negligence*, 2nd ed., p. 190; *Nagle v. Alleghany*, 88 Pa. St. 35. He was of opinion that the single question for decision was whether, in the absence of any evidence to shew that a boy over 14 years is not capable of understanding so simple a question of danger as was here presented to him, and in spite of his own evidence that he did understand, the question whether he did or did not understand it, must nevertheless be submitted to the jury. The boy was over 14 years and a line on the question of capacity must be drawn somewhere. Here the boy put his hand on the machine designedly (though he says he had brushed the dust off on other occasions), and not by accident, though at the time the operator was a yard away looking out of a window.

J. Idington, K.C., for plaintiff.

J. P. Mabee, K.C., for defendants.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, J.J.A.) held that the machine was a dangerous one, and was run at the rate of 3,000 revolutions a minute, and when running the knives would appear like a solid cylinder. The object of the Factories Act in providing that in every factory all dangerous parts of machinery should as far as practicable be securely guarded, was for the protection not only of those operating such machinery, but also of those whose business brings them in close proximity to it. The defendants neglected their duty in this respect, and were guilty of what may properly be called deliberate negligence, which was the effective cause of the accident. And the jury must pass upon the question which then arises, as to whether the lad was guilty of such negligence as severed the causal connection between their negligence and his injury. It cannot be said that a person exercising reasonable care, and, in a moment of thoughtlessness, forgetfulness, or inattention, meeting with an injury caused by the deliberate negligence of another, is deprived of his remedy for his injury. In all such cases it is a question of fact for the jury. There is no ground upon which the question of contributory negligence could in this case have been withdrawn from the jury had the plaintiff been an adult, and there is still less ground as

he is a boy of 15 years. The hard and fast rule in criminal cases as to the age of 14 is inapplicable to civil cases. In the latter, the age, capacity, and experience of the infant must be considered by the jury in ascertaining what measure of reasonable care must be exacted from him: *Crocker v. Banks*, 4 T. L. R. 324. The jury has negatived contributory negligence by finding that the plaintiff used reasonable care for a boy of his age.

Appeal allowed with costs and judgment for plaintiff to be entered below with costs on High Court scale.

Laington & Robertson, Stratford, solicitors for plaintiff.

E. W. Harding, St. Mary's, solicitor for defendants.

APRIL 11TH, 1902.

C. A.

TOWN OF WHITBY v. G. T. R. CO.

Railways—Pleading—Amendment—Damages, Measure of—Breach of Statute by Removal of Railway Workshops—Construction of Statute—45 Vict. ch. 67, sec. 37 (O.)

Motion by plaintiff pursuant to leave given in the judgment of this Court (1 O. L. R. 480) on the appeal from the judgment of BOYD, C. (32 O. R. 99), for leave to amend so as to claim a remedy (if any) against defendants by reason of the breach of the prohibition contained in 45 Vict. ch. 67, sec. 37 (O.), which provides that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company without the consent of the council of the corporation of the town of Whitby."

A. B. Aylesworth, K.C., and J. E. Farewell, K.C., for plaintiffs.

W. Cassels, K.C., for defendants.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, J.J.A.) held that the provisions of the above section were introduced to protect the plaintiffs against the removal of the workshops at the sole will of the Midland Railway Company, and the defendants have succeeded to the position of that company, and assumed and become liable to its obligations. The workshops having been removed partly by each company, and no injunction sought or obtained, the plaintiffs are not left without a remedy, but ought to be allowed to shew in this action such damages as have fairly resulted

from the breach, such as loss of taxes as long as the buildings would last, but those damages cannot be assessed upon the basis of the prohibition being against the shutting down of or the reducing the extent of the work carried on in the workshops. Some of the bases as to damages are indicated in *Village of Brussels v. Ronald*, 11 A. R. 605, *City of St. Thomas v. Credit Valley R. W. Co.*, 15 O. R. 673, but the plaintiffs should not be tied down to these or claims of a similar kind, if there are any others that may appear to be fair and reasonable damages to them as a corporation.

Order made allowing plaintiffs to amend. Reference to Master at Whitby as to damages upon plaintiffs' election to take it within one month. Costs to and including judgment to defendants. Further directions and subsequent costs reserved. If election not made, motion dismissed with costs.

J. E. Farewell, Whitby, solicitor for plaintiffs.

Bell & Biggar, Belleville, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

BANFIELD v. HAMILTON BRASS CO.

Master and Servant—Contract — Exclusive Territory — Rescission—Continuance in Employment after Expiration of Contract—Evidence of Intention to Abandon—Part Payment of Commission.

Appeal by defendants from judgment of LOUNT, J., in action for an account under an agreement made in August, 1897, between the parties, whereby the plaintiff was assigned certain territory within which he was to be entitled to a commission on sales, whether made by himself or others, of defendants' cash register. The defendants alleged a rescission of the contract by a certain letter written to plaintiff, after an interview in Ottawa with defendants' manager, in November, 1897. The letter advised plaintiff that, in accordance with what was said at the interview, the contract was thereby cancelled, and that he could, if he chose, continue to sell registers for defendants, but without exclusive rights to any territory; and that they were to be at liberty to employ other agents in the territory formerly assigned to him. The trial Judge held that the agreement had not been cancelled at the interview which took place, and that the letter had not been sent to plaintiff, having regard to the

subsequent conduct of the parties, the correspondence between them, the condition of the fac-simile of the letter in the letter-book, and the variance between the testimony of defendants' manager on discovery and at the trial.

G. Lynch-Staunton, K.C., for defendants.

W. N. Ferguson, for plaintiff.

The Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the finding of the trial Judge on the question whether the agreement was or was not put an end to should not be disturbed; and moreover the subsequent conduct of the parties corroborates the plaintiff's denial of its termination. It continued therefore in force for a year, and there is no evidence that at the expiration of the year any change in the terms of the plaintiff's employment was contemplated. He continued to do business for them as before, and their letters appear almost conclusive that no change was made. Nor should the finding below be interfered with, holding that the plaintiff in cashing certain cheques of the company for amounts due to him, without making any claim for commissions on sales made by other agents in his territory, did not intend to abandon his right to commissions on other sales not specified in the statements accompanying the cheques. Looking at the correspondence, the plaintiff's employment and his authority to sell for defendants were terminated when they directed him to return his samples.

Judgment below varied by limiting the account directed to be taken to sales made between 27th August, 1897, and 26th February, 1899. In other respects judgment affirmed and appeal dismissed with costs.

Millar & Ferguson, Toronto, solicitors for plaintiff.

Staunton & O'Heir, Hamilton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

BAKER v. ROYAL INSURANCE CO.

Fire Insurance—Proofs of Loss—Delay in Giving—13th Statutory Condition—Disputed Ownership of Lumber Insured—Estoppel.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action to recover amount of loss of certain lumber, etc., insured under policies issued by defendants. After

effecting the insurance with these defendants, certain loans were made by one Thompson, now deceased, upon the security of the lumber, and he insured, as owner, with other insurance companies, who, after the fire, paid the loss. The fire took place on 20th June, 1897. The Chief Justice held (1) that the plaintiff, not having furnished proofs of loss until March, 1898, and not having given sufficient excuse for the delay, had failed to comply with the 13th statutory condition: *Atlas v. Brownell*, 29 S. C. R. 537; (2) that upon the evidence the ownership of the lumber was really in Thompson; that Baker so admitted in the presence of defendants' adjuster, and the agents of the other insurance companies, who had paid Thompson; and that plaintiff was in effect estopped now from asserting ownership.

W. Nesbitt, K.C., and H. E. Rose, for plaintiff.

W. M. Douglas, K.C., and C. S. MacInnes, for defendants.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) was delivered by

OSLER, J.A., holding, upon a review of the evidence, that the judgment below should be affirmed. The ownership was in dispute, the parties claiming as owners and the insurers met, and the plaintiff conceded that the property was Thompson's, and his insurers accepted that situation and paid accordingly, and that is evidence in this action against the other insurers that he was not the owner, and these defendants are entitled to succeed, or it ought to be found upon the evidence that, when all parties met, an agreement was arrived at that the lumber was Thompson's, and not plaintiff's, and that his insurers and not the defendants should pay, and a case of estoppel thus arises. Disposing of the case on the merits, it is not necessary to consider the question of the violation of the 13th statutory condition, but the Court is not opposed to the view taken by the Chief Justice.

Appeal dismissed with costs.

Hewson & Creswicke, Barrie, solicitors for plaintiff.

McCarthy, Osler, & Co., Toronto, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

TUCKETT-LAWRY v. LAMOUREAUX.

Will—Legacy—Ademption—Admissibility of Evidence as to.

Appeal by plaintiff from judgment of FERGUSON, J., (1 O. L. R. 364) dismissing action to recover the balance of

an annuity alleged to be due to plaintiff under the will of her deceased father, George E. Tuckett. The defendants are the executors and trustees. The testator bequeathed annuities of \$6,000 each to his two daughters. Subsequently, having transferred to one of the daughters securities producing \$1,200 a year, he (by codicil) reduced, for that expressed reason, her annuity to \$4,800. A few months later he assigned securities of similar value to the plaintiff, the other daughter, and, by private memorandum, intimated that there was to be a corresponding deduction from her share of his estate. Evidence was adduced of his having instructed his solicitor to alter the will accordingly, but he died almost immediately after giving such instructions, without having made the alteration. Ferguson, J., held that the evidence was admissible to shew, and did shew, that the assignment of the securities to plaintiff was intended to operate as an ademption *pro tanto* of the legacy to her.

E. Martin, K.C., and A. B. Aylesworth, K.C., for appellant.

G. F. Shepley, K.C., and E. H. Ambrose, Hamilton, for defendants.

THE COURT (ARMOUR, C.J.O., OSLER, MOSS, JJ.A.) held that the judgment was right.

MOSS, J.A.—The act of the testator in transferring the securities was an act of bounty as much as the provision in the will, and it was of the same nature. It must be held to fall within the rule stated by Kay, L.J., in *In re Lacon*, [1891] 2 Ch. at p. 501. It was urged that there was a substantial difference in the nature of the two gifts, sufficient, in the absence of evidence of intention, to rebut the presumption. The difference is, that as regards the sum producing the \$1,200 the plaintiff has the absolute power of disposing of it at any time, and, if she chooses to disregard the testator's earnest wish to the contrary, she may deprive herself of the enjoyment of the income during the remainder of her life. But the circumstance that the limitations of the portions differ is not sufficient to prevent the application of the principle of ademption: *Earl of Durham v Wharton*, 3 Cl. & Fin. 146; *Twining v. Powell*, 2 Coll. 261. The oral evidence, so far from rebutting the presumption, fortifies the intrinsic evidence derived from the nature of the two provisions, and aids the view that the testator intended that the provision made in his lifetime should go in part satisfaction of the provision made by the will. Appeal dismissed with costs.

Mewburn & Ambrose, Hamilton, solicitors for plaintiff.
Martin & Martin, Hamilton, solicitors for defendants.

APRIL 12TH, 1902.

C. A.

DOVER v. DENNE.

Trustee—Liability for Acts of Co-trustee—Executor becoming Trustee after Passing Accounts—Acting Honestly and Reasonably and Ought Fairly to be Excused—62 Vict. ch. 15, sec. 1 (O.)—Effect of Request of Testator to Trustee to let Co-trustee Manage Estate.

Appeal by plaintiffs from order of FERGUSON, J., dismissing appeal from report of Master at Peterborough finding that defendant Denne, one of the three trustees under the will of Stephen Wood, who died in 1892, was not liable to make good a loss of about \$5,800 incurred by reason of a breach of trust by his co-trustee, Burnham, who died in December, 1897. The Master found that Denne had no reason to suspect that Burnham, whose reputation for honesty and integrity was very high in the community, would be guilty of misappropriation of the trust funds; that when the testator was about to make his will he asked Denne to become one of his executors and trustees, but Denne refused, because, as he said, he was old and did not know about such things, whereupon the testator told him he did not want him to act in any way, because Burnham would manage everything, as he had always been theretofore doing (Burnham having been the testator's solicitor), and that he (testator) merely wanted Denne's name, in order that, if anything should happen to Burnham, Denne would communicate with testator's son-in-law in England, the defendant Carruthers; that thereupon Denne consented, honestly believing that he was not obliged to take any part in the management of the estate. The Master also found that the beneficiaries and third trustee (Carruthers) acquiesced in the sole management of the estate by Burnham.

A. B. Aylesworth, K.C., and E. B. Edwards, K.C., for plaintiffs.

G. H. Watson, K.C., and Louis M. Hayes, Peterborough, for defendant Denne.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, J.J.A.) held that the report of the Master was right and the appeal should be dismissed.

MACLENNAN, J.A.—On the passing of the accounts, all debts and charges having been paid, and the residue ascertained, the executors became trustees of the testator's estate,

and the liability of the respondent must be determined in that regard: *Re Willey*, W. N. 1890, p. 1; *Re Smith*, 42 Ch. D. 302; *Re Chipman*, [1896] 2 Ch. 773; *Philipps v. Munnings*, 2 M. & Cr. 309, 314; *Dix v. Burford*, 19 Beav. 409, 412. Then, regarded as a trustee, was the respondent guilty of such default as to make him liable? There is no question of the honesty of his conduct. He trusted Burnham, and had no reason to suspect him, a circumstance considered material in such cases. See *In re Gasquoine*, [1894] 1 Ch. 476. Of course it cannot be contended that confidence in a co-trustee, or the absence of reason for suspicion, will or ought to excuse the omission of a plain, obvious duty; but there was no such plain, obvious duty omitted or neglected by the respondent. The respondent is not responsible for the money received and misapplied by Burnham, nor for the mortgages that he improperly assigned. Even if it were held that the respondent was guilty of a breach of trust, it ought also to be held that he had acted both honestly and reasonably, and ought fairly to be excused: 62 Vict. ch. 15, sec. 1 (O.) Although what passed between him and the testator would be no excuse independently of the statute, it is very material on the question whether, under the circumstances, his conduct was reasonable. See *Re Smith*, 18 Times L. R. 432. Appeal dismissed with costs.

E. B. Edwards, Peterborough, solicitor for plaintiffs.

Hall & Hayes, Peterborough, solicitors for defendant.

APRIL 12TH, 1902.

C. A.

MURRAY v. WURTELE.

Promissory Note—Agreement not to Negotiate—Notice of.

Appeal by defendants from order of a Divisional Court reversing judgment of BOYD, C., dismissing action to recover upon a promissory note for \$1,975 made by defendants J. W. Wurtele & Co. in favour of defendant B. A. C. Wurtele, and indorsed by her and defendant J. Wurtele. The Divisional Court held that the note sued on had been given to the Sclater Asbestos Company partly to secure a debt due by defendants J. W. Wurtele & Co. and partly as indemnity against a note for the same amount made by the Asbestos Company and given by it to defendants J. W. Wurtele & Co.; that the plaintiff gave value for and received the note from the manager of the Asbestos Company, without notice of an

alleged agreement that the note was not to become negotiable unless Wurtele & Co. were able to discount the Asbestos Company's note, which they never were able to do; and that as a matter of fact such agreement had never been made.

M. J. Gorman, Ottawa, for defendants.

A. B. Aylesworth, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., OSLER, MACLENNAN, MOSS, JJ.A.) held, after summarizing the facts which ought to be found upon the evidence, that when the plaintiff took the note from the Selater Company's manager, Cass, on account of the debt they owed him, he had notice of the defective title of the company, and knew that they had no right to negotiate it, and could not do so without committing a breach of faith towards defendants, or otherwise than in fraud of their agreement with them. The plaintiff therefore acquired no better title than the company had, and cannot recover against defendants. Appeal allowed with costs and action dismissed with costs.

O'Brian & Hall, L'Original, solicitors for plaintiff.

M. J. Gorman, Ottawa, solicitor for defendants.

APRIL 16TH, 1902.

C. A.

MADILL v. TOWNSHIP OF CALEDON.

Municipal Corporation—Highway—Non-repair of Sidewalk—Corporation Liable whether or not Sidewalk was Constructed by Corporation or Voluntary Contribution and Statute Labour—Such a Walk is a Part of the Highway in the Keeping or Control of the Corporation.

Appeal by defendants from judgment of MEREDITH, J., in action for damages for injuries sustained by plaintiff, who fell, owing to a hole 13 inches deep, 9 inches wide, and 3 feet in length, which had existed for several months in the sidewalk upon the highway of the 3rd line, Caledon West, in the hamlet of Alton.

E. F. B. Johnston, K.C., and E. G. Graham, Brampton, for defendants.

E. E. A. DuVernet, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

MOSS, J.A.—The judgment below should be affirmed. The evidence establishes beyond question that the highway

is one for the maintenance of which, in good repair, the defendants are responsible. Their liability to keep it in repair is admitted as regards the central portion, or part on which vehicles travel, but it is contended that it does not extend to the side or portion on which the sidewalk is shewn to be; that part, however, is as much a part of the original road allowance as the centre part, and may be lawfully used by persons travelling on foot, and had been so used for 20 years, and it is impossible to say that it is not part of the public highway in the keeping or control of defendants. It is not necessary to determine the origin of the sidewalk. If placed there by defendants, or being there was assumed by them, their liability is clear. If not so placed or assumed by them, they allowed it to remain, and in its condition of non-repair it was an obstruction to the safe use of the travelled way, which it was their duty to remove, and by reason of their neglect the highway was out of repair.

Appeal dismissed with costs.

W. D. Henry, Orangeville, solicitor for plaintiff.

E. G. Graham, Brampton, solicitor for defendants.

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APRIL 24TH, 1902.

DIVISIONAL COURT.

BASTON v. TORONTO FRUIT VINEGAR CO.

Contract—By Correspondence — Proposal — Acceptance — “Final Arrangements.”

Carlile v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, distinguished.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing the action.

S. B. Woods, for plaintiff.

No one appeared for defendants.

MEREDITH, C.J.—The action is brought to recover damages for the company's refusal to carry out an alleged contract between the plaintiff and them for the purchase by them from her of the whole of her crop of cucumbers grown in the year 1900.

The company had purchased the plaintiff's crop in 1899, and the agreement for that year is in writing and contains full particulars as to the quantity of ground to be planted, the times for delivery, price, quality, etc.

On 5th May, 1900, the plaintiff wrote to the company as follows:—"Are you going to buy cucumbers this year at Stouffville, and what are you going to pay for them? Please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year. As you have always dealt fair with me, I would like to sell you some more this year. Please let me know by return of mail." The company replied by post card on the 6th May, as follows:—"Yours of the 5th instant to hand, and in reply may say we are pleased to learn you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later and make final arrangements." The plaintiff subsequently

planted six acres with cucumbers and delivered several loads to the company, who paid for them, but it is clear, upon the evidence, that they were not received by the company as under the alleged contract or any contract with the plaintiff, but were received and paid for as cucumbers offered for sale to the company's agent at Stouffville, and purchased by him on their account.

I do not think that the post card amounted to a proposal to purchase the crop, which, according to plaintiff's letter, she intended to grow that year, on the terms mentioned in the post card, and that the delivery of the cucumbers amounted to an acceptance of that proposal, which then remained open for acceptance by plaintiff.

Carlile v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, is, I think, plainly not applicable: see remarks of Bowen, L.J., on pp. 269 and 270.

It is plain that the company required further notification by the plaintiff, and the post card was not an offer open to acceptance by a mere affirmative answer.

Brogden v. Metropolitan R. W. Co., 2 App. Cas. 666, and *Clarke v. Gardiner*, 12 Ir. C. L. R. 472, do not help the plaintiff. The principle of the latter case is wholly inapplicable to this case.

FERGUSON, J., concurred.

Appeal dismissed with costs.

T. H. Lennox, Aurora, solicitor for plaintiff.

St. John & Ross, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

WHITE v. MALCOLM.

*Specific Performance—Contract for Sale of Land—Correspondence—
Statute of Frauds—Agent.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action to enforce specific performance of an alleged agreement by defendant to sell to plaintiff five acres of land in the town of Owen Sound. The Chief Justice held that there was not a binding contract to satisfy the Statute of Frauds, and, also, that the subject matter of the purchase was unascertained, the offer being for park lot 6, which contains 18 acres and for which there had been no negotiation.

H. G. Tucker, Owen Sound, for appellant.

A. G. Mackay, Owen Sound, for defendant.

OSLER, J.A.—One Rutherford, who appears to have been desirous of bringing about a sale in order to obtain a commission for himself, had been asked by the plaintiff if he had the sale of the land in question. In point of fact Rutherford had not, and on 8th February, 1901, he wrote to defendant, who was in Winnipeg, stating that he had an inquiry about the land, and . . . after some correspondence, Rutherford wrote defendant on 18th April that the party who wanted to buy would go \$100 over his former offer of \$2,000, and asking defendant to wire if he concluded to accept. The defendant made no reply, and in fact no such offer of \$2,100 had ever been made by the plaintiff.

On the 29th April the plaintiff wrote and handed to Rutherford the following offer:—"I, William J. White, hereby offer to William M. Malcolm, of the city of Winnipeg, the sum of \$2,100 cash for park lot No. 6, 2nd range, in the town of Owen Sound."

This was the first and only time the plaintiff had made such an offer; it was not communicated to the defendant; but on the same day Rutherford telegraphed to defendant: "Will \$2,100 cash take park lot. Answer." And on the same day defendant replied: "Accept offer, but will not sell the house now." The latter part of the telegram referred to other property of defendant, which Rutherford had some time before been specially authorized to sell. Rutherford shewed this telegram to the plaintiff, but nothing further passed between the parties until the 2nd May, when Rutherford wrote defendant enclosing for execution by defendant and his wife a conveyance which he had at his own expense caused to be prepared by a solicitor. In this letter he says: "Mr. Wm. J. White came to me and offered \$2,100, as I telegraphed you, and which you replied I was to accept. Mr. White thinks the offer he made to you a very good one, but it is his own, and he will have to be satisfied." The defendant declined to negotiate further, and on the 11th May this action was brought. Throughout the correspondence Rutherford was not the agent of either party for the purpose of making a contract except in so far as he may have been made the defendant's agent by the latter's telegram of the 29th April. It is doubtful whether that ought to be read as meaning an acceptance by the defendant himself—I accept offer—referring to the offer untruly stated in Rutherford's letter of the 18th April to have been made on the previous day, or as a direction to Rutherford to accept that or any other offer which might be made to buy at the

price of \$2,100. If it means the former, there was no offer in existence to which the acceptance could be applied, and, even if Rutherford's letter had stated the facts truthfully, the name of the proposed purchaser had not been given, and the telegram cannot refer to plaintiff's written offer of the 29th April, because the defendant was in ignorance that any such offer had been made. On the other hand, if the telegram is to be regarded as a direction to Rutherford, it is no more than an answer to his inquiry whether the defendant will sell at the price named. It contemplates that a contract will be subsequently entered into: *Harvey v. Facey*, [1893] A. C. 552: and is an authority to Rutherford to accept any offer which may be made to buy at that price. Rutherford never acted effectively upon that authority, as he did not accept the plaintiff's offer in writing. In no point of view, therefore, is there any valid contract in writing between the parties sufficient to satisfy the Statute of Frauds, and the judgment of the learned trial Judge should be affirmed on the ground on which he rested it. The evidence suggests more than one other difficulty in the plaintiff's way, but into them it is not necessary to enter.

ARMOUR, C.J.O., MACLENNAN and MOSS, JJ.A., concurred.

Appeal dismissed with costs.

H. G. Tucker, Owen Sound, solicitor for plaintiff.

McKay & Sampson, Owen Sound, solicitors for defendants.

'APRIL 10TH, 1902.

C. A.

BONNVILLE v. GRAND TRUNK R. W. CO.

Railways—Injury to Person Crossing a Main Street of a Town having Eight Tracks—High Degree of Care which should be Exercised by Defendants—Negligence of Defendants—Proximate Cause—To Fasten Liability on Defendants Immaterial to Show that Tracks not Lawfully upon the Street.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiff in action for damages for injuries sustained by plaintiff who was run down by a box car which was being shunted by an engine along one of the eight tracks of defendants crossing King street in the town of Midland. The Chief Justice held that the defendants, having so many tracks in such a busy locality,

without apparent authority, were certainly bound to exercise a very high degree of care, even if no greater legal responsibility attached by reason of the alleged unauthorized use of the highway; that the negligent and illegal conduct of the defendants was the direct and proximate cause of the plaintiff's injury; that plaintiff had not been guilty of negligence; and that, even if he had, the defendants could in the result, by the exercise of ordinary care and diligence, by having the car under control, have avoided the accident.

W. Nesbitt, K.C., and H. E. Rose, for appellants.

E. F. B. Johnston, K.C., for plaintiff.

ARMOUR, C.J.O.—I do not think that the conclusions arrived at by the Chief Justice depend at all upon the question whether or not all of the eight tracks of the defendants' railway crossing the main street of the town, along which the plaintiff was lawfully walking when he was injured by the cars of the defendants, were lawfully upon the street, for his conclusions are supported by the evidence, assuming that they were there lawfully. The care that the defendants were bound to take in maintaining all these tracks across the main street, and running and shunting their cars upon them, was a care commensurate with the danger occasioned thereby to those passing along the street, and such care, the Chief Justice rightly held, the defendants did not take. Under the circumstances the plaintiff was not guilty of negligence.

OSLER, J.A.—The plaintiff was rightfully passing along the highway, and in doing so attempting to pass over the eight lines of track. I do not assent to the view that these tracks were wrongfully there, or laid down without authority, but it is not necessary to determine that, if it has not been already decided. But, even though they were lawfully there, the public had the right to cross them in going about their lawful business . . . and it was incumbent on defendants—so at least a Judge and jury might find—to take special precautions against running into persons passing over the tracks, more particularly when the work of shunting cars was going on, an operation which, from the comparative slowness and quietness with which it is done, does not convey to persons on or near the tracks the same warning which a large train in motion would do. It appears to me that when the plaintiff was seen by the person in charge of the car which hurt him, while some 200 feet away, and standing still, apparently unconscious of the approach of

the car, it was the duty of the former to so manage it that it should not run against him. He had plenty of time to stop the car, and in considering whether it was reasonable that he should have done so, the simple nature of the operation he was engaged in is to be regarded, as the car could very easily have been stopped and the work delayed for a time without inconvenience to any one. Instead of doing so or reducing the speed so as to bring the car more under control, he seems to have let it go on, hoping that the plaintiff would move, until it was too late to avoid collision. I do not think that the trial Judge was wrong in holding that for this the defendants must answer. . . . Whatever may be said of plaintiff's negligence, the proximate cause of the accident was defendants' negligence. Perhaps the plaintiff was standing too near the track. I do not think he was consciously doing so. But he was not aware of the approaching car, while the person in charge was aware of him and might have avoided the collision by stopping it in time.

MACLENNAN and MOSS, JJ.A., concurred.

Appeal dismissed with costs.

John Bell, Belleville, solicitor for appellants.

• R. D. Gunn, Orillia, solicitor for respondent.

MACMAHON, J.

APRIL 19TH, 1902.

TRIAL.

IROQUOIS ELECTRIC LIGHT CO. v. VILLAGE OF IROQUOIS.

Municipal Corporation—Electric Light Plant—Compulsory Expropriation—"Have Supplied"—R. S. O. ch. 223, sec. 566, sub-sec. 4, as amended by 62 Vict. (2) ch. 26, sec. 35, sub-sec. 4 (a).

Action by the plaintiffs (the company and Patrick Keefe) for a mandatory injunction requiring defendants to make an offer to purchase the electric light plant in the village of Iroquois belonging to the plaintiff company, and, if the offer be not accepted, then for the appointment of an arbitrator for the purpose of valuing the same under the Municipal Act to determine the compensation to be paid for said plant and to compel defendants to take it over at the value so fixed.

D. B. MacleNNan, K.C., and C. H. Cline, Cornwall, for plaintiffs.

A. B. Aylesworth, K.C., and Adam Johnston, Morrisburg, for defendants.

MACMAHON, J.— . . . In 1895 a by-law authorizing a contract with the plaintiff Keefe, who had been lighting private residences by contract, and some streets by private subscription, to add one more light, was submitted to the ratepayers and defeated. In July, 1897, the Dominion Government expropriated the land occupied by Keefe's plant, and he ceased to operate his works. In December, 1897, the defendants made a lease to Keefe for ten years from 1st January, 1898, for \$1 a year, of the grounds, etc., belonging to the intake pipe and wheel pit on the north bank of the canal in the village of Iroquois. . . . The lease contains a covenant that Keefe shall sell, on 6 months' notice to the village, at a valuation, the leased premises and improvements, and if the parties cannot agree as to value it is to be determined by arbitration. . . . The wheel pit had been built for defendants by one Buchanan, who assigned his claim to Keefe, who recovered a judgment for \$1,950 against defendants, who paid the amount. . . . In December, 1898, the Government cut off the water supply. The plaintiff company was incorporated on 3rd May, 1901. The plaintiff Keefe and his two sons are the provisional directors. The plant which plaintiffs desire to have purchased consists of two dynamos, etc., which, since 1897, have been stored in a warehouse. . . . Keefe could not now sell the wheel pit to the defendants because they became owners when they paid the judgment for the amount of Buchanan's claim for building it for them.

R. S. O. ch. 223, sec. 566, sub-sec. 4, as amended by 62 Vict. (2) ch. 26, sec. 35, sub-sec. 4 (a), cannot apply because the plaintiff company has only been in existence since 3rd May, 1901, and never supplied electric light to the village, and the plaintiff Keefe has not, as an individual, supplied it for nearly nine years. More apt language might have been used in cl. (a), but the words "have supplied" must, having regard to the design and scope of the Act, mean that the company or individual has supplied and is supplying electric light for street lighting at the time notice is given by the municipality of the price at which it offers to purchase the works; and that the Act intended that the municipality should only be called on to fix a price to be offered for works and property that it could at once utilize as an existing going concern, is apparent from the language of cl. (a 3) of the amending Act, relating to the duties of the arbitrators as to price, which prevents them from awarding anything for prospective profits or franchises.

The statute gives neither Keefe nor the company the right to compel the village to fix a price and proceed to arbitrate in respect to the value of the chattels which he owns, forming part of what was once an electric light plant, and the lease gives no added rights to the plaintiffs or to either of them.

The action must be dismissed with costs.

ROBERTSON, J.

APRIL 22ND, 1902.

TRIAL.

McLAUGHLIN v. MAYHEW.

*Specific Performance—Verbal Contract—Possession by Purchaser—
Part Payment—Conveyance Executed but Held for a Time as
Security for Balance of Purchase Money.*

McClung v. McCracken, 2 O. R. 609, 5 A. R. 596, distinguished.

Action tried at Bracebridge, brought to compel specific performance of an agreement for the purchase of a lot in the village of Huntsville containing one-eighth of an acre.

E. E. A. DuVernet and O. M. Arnold, Bracebridge, for plaintiff.

R. D. Gunn, Orillia, for defendant trustees.

D. Grant, Huntsville, for defendants Reid and Ware.

ROBERTSON, J.—McClung v. McCracken, O. R. 609, 5 A. R. 596, is clearly distinguishable, and the plaintiff is entitled to judgment. There was here an express parol agreement not only proved, but admitted; the parties to it were named; the owner of the property was the Lodge of I. O. O. F., of which defendants Mayhew, Wieler, and Whaley were the trustees, who were authorized by resolution of members of the lodge to sell, etc.; part of the purchase money was paid; the plaintiff entered into possession and was recognized as the purchaser by the trustees sending the collector to him for payment of taxes for that year, although assessed to the lodge as owner, and such taxes were paid by the plaintiff, who was assessed for taxes the following year. So, apart from the conveyance in this case, these facts are undeniable; and then the conveyance was signed by the proper parties; the plaintiff was named therein; the consideration money was expressed; the property was fully described; and by mutual assent, caused by the delay of the vendors in preparing the deeds, the vendors agreed that the payment of the balance of purchase money

should remain for a short time, holding the deed in the meantime as security for the balance of the purchase money. Refer to *Chinook v. Marchioness of Ely*, 4 DeG. J. & S., per Lord Westbury, at p. 646.

Judgment accordingly for plaintiff.

OSLER, J.A.

APRIL 21ST, 1902.

C. A.—CHAMBERS.

LAROSE v. OTTAWA TRUST AND DEPOSIT CO.

Contract—Board and Lodging—Bequest in Lieu of—Lapse—Leave to Appeal Refused.

Motion by defendants for leave to appeal from order of a Divisional Court, *ante* p. 210.

A. B. Aylesworth, K.C., for defendants.

J. E. Jones, for plaintiff.

OSLER, J.A.—On the whole, after much consideration, a great deal being able to be said, from the evidence, in support of either side, I think it was open to the trial Judge and the Divisional Court to draw from the evidence the conclusions at which they have arrived, and that there should be no further appeal. Motion dismissed with costs.

APRIL 11TH, 1902.

C. A.

ROCKETT v. ROCKETT.

Mortgage — Covenant — Agreement for Board in Lieu of Interest—Settlement of Claim not Binding where Administrator not Appointed.

Appeal by plaintiffs from judgment of MEREDITH, C.J., in action on a covenant contained in a mortgage made in 1883 by defendant to plaintiffs, his sisters, and their mother since deceased, to secure \$3,000, with a proviso that the mortgage was to be void on payment at the end of 5 years of \$1,000 to Mary Rockett, \$1,000 to plaintiff Mary Ann Rockett, and \$1,000 to plaintiff Agnes Rockett, with interest. Mary Rockett died in November, 1898, and plaintiff Mary Ann Rockett is her administratrix. The mortgage provided for payment of interest on interest and a compounding every six months. The defendant set up an agreement made at time of mortgage that so long as the mortgagees remained on the farm, and were supported by him, interest should thereby be considered satisfied, and

further set up an agreement made by Mary Ann and Agnes after the death of their mother to accept \$2,900 in full. He claimed that if the estate of the mother was not bound by the settlement, he should be indemnified by Mary Ann and Agnes, and he paid the \$2,900 into Court. The Chief Justice held that the settlement was not binding because there was then no administrator to the mother's estate, but that the agreement was actually made and was binding, and also that \$40 over and above the \$2,900 was due, and gave judgment for \$40 without costs.

G. G. McPherson, K.C., for appellants.

W. R. Riddell, K.C., for defendant.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, JJ.A.) held that the evidence supported the finding that the maintenance of the mortgagees on the farm was to be in lieu of interest, but that, as the amount paid into Court was \$2,900, and not \$2,960, as the Chief Justice thought, the judgment should be increased to \$100, the amount due under the mortgage being \$3,000. Judgment varied accordingly and in other respects appeal dismissed without costs; MACLENNAN, J.A., dissenting as to the costs.

LOUNT, J.

APRIL 19TH, 1902.

TRIAL.

MURRAY v. EMPIRE LOAN AND SAVINGS CO.

*Vendor and Purchaser—Sale of Land—Balance of Purchase Money—
Evidence—Weight of—Corroboration.*

Action brought to recover \$3,000 alleged by plaintiff to be the balance due in respect of purchase money (\$9,000) upon a sale of certain property by her to defendants. Defendants counterclaimed for arrears of taxes left unpaid by plaintiff.

W. Cassels, K.C., and A. W. Anglin, for plaintiff.

C. H. Ritchie, K.C., A. H. Marsh, K.C., and J. Turner Scott, for defendants.

LOUNT, J.—The plaintiff's evidence has been contradicted by witnesses for defendants whose evidence should, I think, be accepted. Moreover, the correspondence and documentary evidence does not support the plaintiff's account of the transaction, but corroborates and confirms that set up by defendants, and therefore should be given effect to, and the action be dismissed. There is no dispute

as to the counterclaim, and there should be judgment on it for defendants for \$291.90 with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiff.

Scott & Scott, Toronto, solicitors for defendants.

APRIL 18TH, 1902.

DIVISIONAL COURT.

KNICKERBOCKER TRUST CO. OF NEW YORK v.
BROCKVILLE, WESTPORT, AND SAULT
STE. MARIE R. W. CO.

*Railways—Bonds—Inquiry as to When Held as Collateral Security—
Judgment—Reference—Duty of Master.*

Appeal by one Hervey, a creditor, from order of FERGUSON, J., affirming report of Master at Brockville.

W. E. Raney and J. A. Hutcheson, Brockville, for Hervey.

J. H. Moss, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The appeal should be allowed and the matter referred back to the Master to take the accounts and make the inquiries directed by the judgment, the 11th paragraph of which is certainly wide enough to cover the claims of the persons who are creditors in respect of the bonds of the railway company, as well as those of persons who have merely advanced money upon its bonds as pledgees of them. The inquiry thus directed is necessary in order that the position of the company may be ascertained. Its position is not ascertained merely by stating that bonds are outstanding to a fixed amount, unless that amount correctly represents the amounts for which the bonds are held. It was stated at Bar and not disputed, that the bonds have been issued to parties as security for debts less than the face value of the bonds so issued, but the Master has refused to take evidence of the true amount of the debt, and in so doing has erred, and the fact that further directions are reserved is no reason for not doing so.

APRIL 14TH, 1902.

C. A.

RE LORD'S DAY ACT OF ONTARIO.

Constitutional Law—Powers of Provincial Legislature—Act to Prevent Profanation of Lord's Day—Working on Sunday—Necessity—Conveying Travellers.

The following questions were submitted to the Court of Appeal by the Lieutenant-Governor in Council, pursuant to R. S. O. 1897 ch. 84:—

1. Had the Legislature of Ontario jurisdiction to enact R. S. O. 1897 ch. 246, intituled "An Act to Prevent the Profanation of the Lord's Day," and in particular secs. 1, 7, and 8 thereof?

2. (a) Had or has the Legislature of Ontario power by the aforesaid Act, or any Act of a similar character, to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's day, within the Province, upon and in connection with the operation of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings to which the exclusive legislative authority of the Parliament of Canada extends under the British North America Act, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10 (a), (b), (c)?

(b) Had or has the Legislature of Ontario power to prohibit the doing or exercising of any worldly labour, business, or work, on the Lord's day, within the Province, when such prohibition would affect any matter to which the exclusive legislative authority of the Parliament of Canada extends under any other sub-section of sec. 91, as, for example, sub-secs. 5, 10, and 13.

3. In sec. 1 of R. S. O. ch. 246, or C. S. U. C. ch. 104, as the case may be, do the words "other person whatsoever" include all clauses or persons other than those enumerated who may do any act prohibited by said section, or is the meaning of these words limited so as to apply only to persons *ejusdem generis* with the classes enumerated?

4. Subject to the exceptions therein expressed, does sec. 1 prohibit individuals who, for or on behalf of corporations, do the labour and work or exercise the business of carrying passengers for hire, from doing such labour and work and exercising such business on the Lord's day, whether the cor-

porations for or on behalf of which the work or labour is done, are or are not within the prohibition of said section?

5. Do the words "conveying travellers," as used in sec. 1, apply exclusively to the carrying to or towards their destination of persons who are in the course of a journey at the commencement of the Lord's day?

6. Does sec. 1 apply to and include corporations?

7. (a) Do the words "work of necessity," as used in sec. 1, apply so as to include the doing of that which is necessary for the care or preservation of property so as to prevent irreparable damage other than mere loss of time for the period during which the prohibition extends?

(b) If so, is the necessity contemplated by the statute only that which arises from the exigency of particular and occasional circumstances, or may such necessity grow out of or be incident to a particular manufacture, trade, or calling?

(c) If such necessity may grow out of or be incident to a particular manufacture, trade, or calling, do the words "work of necessity" apply exclusively to the doing on the Lord's day of that without which the particular manufacture, trade, or calling cannot successfully be carried on during the remaining six days of the week?

The questions were argued before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, JJ.A., on the 2nd, 3rd, and 4th April, 1901.

John A. Paterson and A. E. O'Meara, for the Attorney-General for Ontario.

A. H. Marsh, K.C., and J. H. Moss, for classes of persons interested.

ARMOUR, C.J.O.—As to question 1, I am of the opinion that the Legislature of Ontario had no jurisdiction to enact R. S. O. 1897 ch. 246, intituled "An Act to prevent the Profanation of the Lord's Day," in its present form and to the full extent of its provisions.

The profanation of the Lord's day is an offence against religion, and offences against religion are properly classed under the limitation "crimes," and consequently the enacting of laws to prevent the profanation of the Lord's day, and imposing punishment therefor by fine, penalty, or imprisonment, properly belongs to the Parliament of Canada under sub-sec. 27 of sec. 91 of the British North America Act, and to this extent ch. 246 is beyond the power of the Legislature of Ontario.

The consequence of this opinion is that to this extent C. S. U. C. ch. 104 is still in force, never having been repealed by competent authority.

And as a result of this opinion I answer questions 2 (a) and (b) in the negative.

As to question 3, I say that the meaning of the words "other person whatsoever" in sec. 1 of C. S. U. C. ch. 104 is limited so as to apply only to persons *ejusdem generis* with the classes enumerated.

I answer questions 4, 5, and 6 in the negative.

Question 7 (a), I answer in the affirmative, and as to (b), I say that such necessity may grow out of or be incident to a particular manufacture, trade, or calling, and I answer (c) in the negative.

OSLER, J.A.—My answer to the first question is in the affirmative, referring for my reasons to my judgment in *Regina v. Wason*, 17 A. R. at pp. 221, 238.

2 (a), 2 (b): I answer these questions in the negative.

3: The first branch of this question I answer in the negative, the second branch in the affirmative.

4: I answer this question in the negative.

5: I answer this question in the negative.

6: I answer this question in the negative.

My reasons for these answers will be substantially found in the decisions in *Attorney-General v. Niagara Falls Tramway Co.*, 18 A. R. 453; *Regina v. Somers*, 24 O. R. 244; *Attorney-General v. Hamilton Street R. W. Co.*, 24 A. R. 170; *Regina v. Reid*, 26 A. R. 181, 30 O. R. 732.

7 (a), (b), (c): I find it difficult to understand the scope of these queries or their true meaning, and to answer them in such a way as not to make the answers of doubtful application in many of the ever-varying circumstances and conditions which may from time to time hereafter arise between parties in a real litigation. I must, therefore, with all respect, ask to be excused from attempting to solve them, as no useful answer can be given to them. Further, with the like respect, I submit that, while it may be reasonable and proper to take the opinions of the Bench as to the constitutional validity of an Act or section of an Act, it is not convenient that the power of the Lieutenant-Governor in council under R. S. O. 1897 ch. 84 should be exercised by asking the Judges to answer questions such as number 3 and the

following questions, assuming that the Act ever contemplated the submission of such questions. They relate to matters which I humbly submit ought to be left for decision when they are raised in actual litigation in the application and construction of legislative enactments with reference to an existing state of facts. When they are presented, as they here are presented, *in scena* and not *in foro*—argued and decided academically and not judicially—the answers are likely to embarrass and perplex Judges and parties who may afterwards have to deal with such questions or similar questions arising under varying facts and circumstances as they may be presented in actual litigation. More especially is this likely to be the case where answers to abstract questions are intended to be or may be made use of by inferior judicial officers, justices of the peace, police magistrates, etc., in summary proceedings before them.

I must add that I reserve, as in former similar cases I have reserved, the right to arrive at a different opinion upon all or any of the questions I have answered, except in so far as I may be precluded by authority from doing so, should they or any of them again come before me in the course of actual litigation.

MACLENNAN, J.A.—I am of opinion that the questions submitted to us should be answered as follows—

1: Yes.

2 (a) and (b): No.

3, first branch: No.

3, second branch: Yes.

4: No.

5: No.

6: No.

7 (a), (b), (c): I have given a great deal of attention to these questions, and to the arguments which were addressed to us, and must confess my inability to answer them. In order to do so it appears to me one would require to arrive at an exhaustive definition of “works of necessity,” a definition limiting the extent of the signification of the words, and including every conceivable work to which they could apply. I have not found myself able to do that; and must, therefore, respectfully pray to be excused from answering those questions.

Moss, J.A.—I have considered the case and the questions submitted. A number of the questions appear to me

to be covered by authority, and in the answers I give as respects such questions I am stating what I understand to be the law as declared by the decisions of the Courts, or the effect of the preponderance of authority where there have been differences of opinion.

I am of opinion that the questions submitted should be answered as follows:—

1: in the affirmative.

2 (a): in the negative.

2 (b): in the negative.

3: the first branch in the negative, the second branch in the affirmative.

4: in the negative.

5: in the negative.

6: in the negative.

7 (a), (b), (c): upon the same ground and for reasons similar to those stated by my brother MacLennan, I must respectfully ask to be excused from making any further answer to these questions. To undertake to answer them would be to endeavour to give an exhaustive definition of "works of necessity," or to lay down a series of abstract propositions not having application to any particular case or set of circumstances, a thing dangerous to attempt, and, if attempted, likely to lead to embarrassing and possibly mischievous results when afterwards sought to be applied to actual cases.

And upon similar considerations, I beg leave to reserve the right to reconsider the answers I have given (except of course in regard to such as are already covered by binding authority), should they or any of them arise in course of actual litigation.

LISTER, J.A., died while the questions were under consideration.

APRIL 26TH, 1902.

DIVISIONAL COURT.

MUNRO v. TORONTO RAILWAY CO.

Infant—Lease by—Repudiation—Partition—Amendment—Parties.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing the action with costs, the plaintiff having refused to amend, adding his co-lessors as parties, as allowed by the judgment noted *ante* p. 25. The same counsel appeared.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—It is clear that we cannot declare the partition binding upon the defendants who were not made parties to it. The only question upon this part of the case is whether we can order a partition of the land between the plaintiff and defendants for the remainder of the term, without having the plaintiff's co-lessors added as parties. In my opinion, they are not necessary parties to such a partition; they have no interest whatever in any part of the land until the expiration of defendants' lease, and the partition asked for by the plaintiff can only remain in force during the term of the lease. When the term expires, the partition already made between the plaintiff and his co-tenants comes into force. At present the plaintiff holds no land in severalty as against the defendants, for he and they are tenants in common of the whole of it during the remainder of the term. What he asks is that one-third of the land may be set apart for him, to be held by him in severalty, only until the defendants' rights expire, and in this the other parties have no concern. Therefore, the co-lessors are not necessary parties to this action, and it should not be dismissed because plaintiff has refused to add them: *Baring v. Nash*, 1 V. & B. 551; *Mason v. Keays*, 78 L. T. 33. The plaintiff's right to mesne profits, and to compensation for buildings pulled down by defendants, depends upon whether he has been excluded from the land, for there has been no actual receipt of rents by the defendants: *Henderson v. Eason*, 17 Q. B. 701; *Murray v. Hall*, 7 C. B. 441. So long as one tenant in common is only exercising lawfully his rights as tenant in common, no action lies against him for trespass, but if his acts are equivalent to an exclusion of his co-tenants, then there is an ouster, and trespass will lie: *Goodtitle v. Toombs*, 3 Wills. 118; *Doe d. Wawn v. Horn*, 3 M. & W. 333; *Wilkinson v. Haygarth*, 12 Q. B. 837; *Stedman v. Stedman*, 8 E. & B. 1; *Jacobs v. Seward*, L. R. 8 H. L. 464. The evidence in the present case is, that defendants, having taken possession of the whole property, which before that time appears to have had a small house and barn and outhouse upon it, converted the place into a pleasure ground, pulled down the house, etc., and made extensive alterations. The plaintiff demanded possession, and, although it was never refused him, it was never offered to him. I think that, under the circumstances, however, the use made by the defendants of the property

was practically an exclusion of him from any use which he could make of it. A large part of it was cut up by roads and paths, and occupied by the defendants' buildings and railway line, and any use that the plaintiff could make of it must necessarily be interrupted by the swarms of visitors, and therefore plaintiff is entitled to mesne profits and damages. Judgment should be entered for partition. Reference to fix mesne profits and damages. Costs of action to trial inclusive and costs of appeal to plaintiff. Further directions and subsequent costs reserved.

APRIL 10TH, 1902.

C. A.

FORD v. METROPOLITAN R. W. CO.

Street Railway—Negligence—Measure of Duty—Judge's Charge to Jury—Damages—Reduction of.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff upon the answers of the jury in an action for damages for bodily injury. The plaintiff on 24th May, 1900, was a passenger on defendants' railway, and when the car, which was going south, arrived at Thornhill, he alighted, and walked north on Yonge street on the track, keeping to the east side to avoid a horse and buggy coming south. The car then backed north along the track, which is on the east side of the street, and ran down the plaintiff, who alleges that the headlight was not transferred to the north end of the car, as it should have been, nor was any warning given him of approach, nor was the conductor or motorman at that end of the car. In answers to nine questions the jury found that plaintiff was not guilty of negligence, and could not, with exercise of reasonable care, have got out of the way of the car; that defendants were guilty of negligence which caused the accident, and consisted in not having a headlight at the north end of the car, nor a light inside the car, in not sounding a gong or warning, and in not giving instructions to the conductor of the car when to cross at the different switches; and they assessed the damages at \$1,800.

A. B. Aylesworth, K.C., and I. F. Hellmuth, for appellants.

T. H. Lennox, Aurora, and S. B. Woods, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

OSLER, J.A.—The defendants contend that there was no evidence of negligence on their part; that the plaintiff's own negligence was the cause of his injuries. They also complain of misdirection and nondirection on the part of the trial Judge, and they say that in any event the damages are excessive.

As regards the question of negligence, I am clearly of opinion that the learned trial Judge could not, with propriety, have withdrawn the case from the jury and dismissed the action. The facts proved were proper for their consideration, and it was for them to say whether they shewed negligence on the defendants' part, or contributory negligence on the part of the plaintiff.

As to the former, the measure of the defendants' duty is stated with sufficient accuracy in one of their reasons of appeal, viz., having regard to the circumstances of time and place, and the danger to be apprehended, they are required to take reasonable precautions, and to give reasonable warning of the approach of their cars.

The time was night—a dark night—the evening of a public holiday; the hour not very late; so that travellers were not unlikely to be abroad. The place was in or near a village; a public highway where people had the right to be walking or riding. The car was proceeding in an unusual direction, or rather in a direction in which the plaintiff had no reason to expect it would be going. It was going along very slowly, it is true, but for that very reason was making less noise and thus giving less warning of its approach. Yet the defendants gave no other warning. They excuse themselves for the absence of light by the failure of the electric current, but the jury might very reasonably have thought that this only made it the more incumbent on them to give notice of the approach of the car by sounding the gong, which might have been done. The plaintiff's accident was fairly and properly attributable to the absence of some such warning; unless it could be said that it was caused by his own negligence, or contributory negligence.

As to this the jury have found in his favour, and I think properly so. He was walking where, by law, he had the right to walk. He had reason to expect warning of the approach of a car, and he had no reason to expect that this particular car would have returned to the north switch. He might well have attributed such noise as he heard to the

movement of the same car proceeding, as he supposed, on its southward journey; and his attention was distracted by the vehicles driving down towards him, of which he had to keep out of the way.

The findings of the jury in these two aspects of negligence are, I consider, well supported by the evidence.

I do not see that there was any misdirection of which the defendants are in a position to complain. Some remarks are found in the charge which the learned Judge would probably have desired to correct, had his attention been called to them; but, under the circumstances, we cannot say that they now call for notice.

The Judge, I think properly, explained to the jury the respective rights of the public and of the company on the highway. He was not bound to tell them that if the car was moving only at the rate of 3 or 4 miles an hour, there was no higher duty upon the company to give notice than would be cast upon a person driving a waggon or other vehicle. And I do not think that any observation as to its being the duty of "the car" going north to have remained at the south switch until the other had passed it there, was at all likely to have misled the jury, in dealing with the other plain facts of the case.

There remains the question of damages. The jury gave \$1,800. The plaintiff's expenditure has been perhaps \$100. His sufferings were severe, and he was confined to the house for several weeks. No bone was broken, and his permanent injury seems likely to be a certain flattening of the foot, some degree of lameness, and a possible tendency to rheumatism.

I cannot but think that the sum awarded by the jury is largely in excess of what has been given in the case of much more serious injuries, although, no doubt, we cannot say that there is a standard of damages in such cases.

I favour granting a new trial, unless the plaintiff consents to the judgment being reduced to \$900. In that event the appeal should be dismissed with costs.

If the plaintiff does not agree to this course, then there should be a new trial. Costs of appeal to defendants, and other costs in the cause.

T. H. Lennox, Aurora, solicitor for plaintiff.

Barwick, Aylesworth, Wright, & Moss, Toronto, solicitors for defendants.

APRIL 10TH, 1902.

C. A.

HOSPITAL FOR SICK CHILDREN v. CHUTE.

Will—Trustee—Advances—Discretion.

Appeal by plaintiffs from judgment of BOYD, C., dismissing action by plaintiffs, who are legatees under the will of Alice Bilton, deceased, for an account of the dealings of the trustees under the will with the assets of the estate, restraining their further dealing with them, and to set aside certain transfers of real property assets alleged to have been made to other legatees as advances under the powers vested by the will in the trustees. The testatrix devised all her estate to trustees (her two sisters, the defendants A and E. Chute), with power to sell, etc., directed the payment of certain legacies, gave annuities to her two children, and empowered the trustees from time to time "to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable. I do not desire that my trustees should consider this to be obligatory upon them nor that my children should consider that they can compel my trustees to make such advances or payments. I leave this entirely in the discretion of my trustees desiring that they should take my position in regard to my children and deal with them as they think under all the circumstances may be in their true interest;" and directed that on the death of all her children the estate then undisposed of should be divided per capita among all their children, but if none were living, then among the five charities (including plaintiffs) named. The question raised was whether the distribution of the residuary estate between F. U. and N. Bilton, the two children of the testatrix, was a lawful exercise of the discretionary power and trust to make advances. The Chancellor held that the power was an arbitrary and uncontrollable one and that the trustees might, no bad faith or conspiracy having been shewn, if they pleased, exercise it without regard to the other trusts reposed in them.

S. H. Blake, K.C., and J. Bicknell, for plaintiffs.

W. H. Blake and J. J. Lundy, for defendants the other charities in same interest as plaintiffs.

J. H. Macdonald, K.C., and F. C. Jones, for defendants executrices.

G. F. Shepley, K.C., for defendant F. U. Bilton.

W. R. Riddell, K.C., for defendant N. Bilton.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) held that the power confided to the trustees is of very wide extent and is ample to justify what they have done—make advances out of the corpus, and in effect defeat other bequests; and it is difficult to imagine what language could have been employed giving more complete and absolute discretion in the exercise of the power, which the evidence shews has been exercised in good faith, and not from any indirect or improper motive.

Appeal dismissed with costs.

Ev. J.M.

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No. 17.

BURBIDGE, J.

MARCH 4TH, 1902.

EXCHEQUER COURT OF CANADA.

FINDLAY v. OTTAWA FURNACE AND FOUNDRY CO.

Industrial Design—Manufactured Imitation of—Infringement—Register of Designs—Jurisdiction of Exchequer Court.

Action for injunction to restrain the defendants from infringing the registered industrial design of the plaintiffs in respect of the "Royal Favorite" cooking stove, by applying the said design, or a colourable imitation thereof, to the manufacture of the stove named by the defendants the "Royal National," or by selling or exposing for sale or use the said "Royal National" stoves, or colourable imitations of the "Royal Favorite" stoves, and to have the register of industrial designs rectified by expunging therefrom the industrial designs of the defendants' "Royal National" stoves.

W. D. Hogg, K.C., for plaintiffs.

G. F. Henderson, Ottawa, for defendants.

BURBIDGE, J.—I do not think anything would be gained by reserving this case. It is largely a question of fact that is to be determined, and the question has been very fully discussed. I have no doubt that I have jurisdiction in the matter, and I think it clear that the plaintiffs have a registered design in respect of which they are entitled to protection.

As to the law bearing on the case, it is, I think, to be found in the cases referred to in *In re Melchers*, 6 Ex. C. R. at p. 101—*Harper v. Wright*, *Holdsworth v. McCrea*, and *Hecla Foundry Co.'s case*—and *Oliver v. Thornley*, 13 *Cutl. P. C.* 490.

Then as to the question of imitation, it seems to me that the stove the defendants are making, the "Royal National," is, as it is now manufactured, an obvious imitation of the plaintiffs' "Royal Favorite," for which the latter have a registered design. I do not think I am called upon to express any opinion as to whether or not the defendants might make a stove similar in dimensions and shape to the "Royal Favorite" that would not be an imitation of the "Royal Favorite." The only question here is whether the

"Royal National" is an imitation or infringement of the plaintiffs' registered design, and I think it is. I confine myself to that issue, and I hold myself free to deal, upon its merits, with any other case that may arise.

Now, as to the remedy. I think the plaintiffs are entitled to an injunction against the manufacture and sale of the "Royal National" stove in the form in which it has been manufactured and with the design adopted by the defendants. I do not say that the defendants are not entitled to manufacture a stove to be called the "Royal National," only that they are not to manufacture it in the form and with the design shewn in evidence in this case. I agree with Mr. Henderson that if an injunction should be granted, there should also be an order to expunge from the register of industrial designs the defendants' registration of the "Royal National." There will be such an order.

On the question of the disposition to be made of the "Royal National" stoves already manufactured by the defendants, I understand the parties to say that it is possible that they can come to an agreement as to that; but if they are not able to do so, there will be a reference to the Registrar to ascertain how many there are of such stoves; and the question of the disposition to be made of them will be reserved until after his report is made.

I think the plaintiffs are entitled to their costs, to be taxed.

O'Connor, Hogg, & Magee, Ottawa, solicitors for plaintiffs.

MacCraken, Henderson, & McDougal, Ottawa, solicitors for defendants.

OSLER, J.A.

APRIL 28TH, 1902.

C. A.—CHAMBERS.

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

*Drainage Referee—Official Referee—Jurisdiction—Judicial Officer—
Leave to Appeal.*

Motion by defendants for leave to appeal from the judgment of a Divisional Court (FALCONBRIDGE, C.J., STREET, J.), ante p. 274.

J. H. Moss, for defendants.

G. H. Watson, K.C., for plaintiffs.

OSLER, J.A.—There is a plain and weighty reason for giving leave to appeal in this matter, viz., that the judgment in question involves the status, jurisdiction, and authority of a judicial officer, and the validity of proceedings which

may be taken by him hereafter under the order of the Divisional Court. Plausible reasons have been suggested against the view of the Divisional Court. Leave to appeal granted on the usual terms.

APRIL 28TH, 1902.

DIVISIONAL COURT.

PICHÉ v. MONTGOMERY.

Landlord and Tenant—Excessive Distress—Irregularities—Waiver—Sale for Full Value—Account of Proceeds.

Appeal by plaintiff from judgment of County Court of Carleton in action for damages for illegal distress.

The trial Judge held that under an agreement between plaintiff and defendant Montgomery, the landlord, the former, after receipt of notice to quit, had taken certain goods as exemptions and left the rest to pay the rent, and had thereby waived all irregularities. He found \$104 due at time of seizure.

W. E. Middleton, for plaintiff.

A. D. Lees, Ottawa, for defendant.

MEREDITH, C.J.—The finding as to rent due was correct, and upon the evidence the distress was not excessive. There was evidence to support the finding below as to waiver, and therefore such finding ought not to be disturbed. The contention that the sale should have been stopped as soon as contents of barber shop had been sold because sufficient had been realized to satisfy rent, expenses, and water rates, though not taken below, fails because the goods sold for their full value and the whole proceeds were accounted for to plaintiff or his solicitor.

FERGUSON, J., concurred.

Appeal dismissed with costs.

A. E. Lussier, Ottawa, solicitor for plaintiff.

Lees & Kehoe, Ottawa, solicitors for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

BAILEY v. GILLIES.

Guarantee—Consideration—Novation—Statute of Frauds, sec. 4.

Beattie v. Dinnick, 27 O. R. at p. 295, explained.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff in action to recover amount due for work and labour in driving saw logs down the Madawaska river to Arnprior, for one J. McCrea, who was under contract with defendants for that purpose, and part of whose work was subsequently, by agreement with defendants, per-

formed for them by plaintiff. The trial Judge found that defendants were anxious to have the drive finished, and agreed with McCrea, and also with plaintiff, to take over from McCrea the several contracts he had with defendants and other owners of saw logs and to pay plaintiff what was due him at the time from McCrea, and also for continuing the drive.

W. M. Douglas, K.C., for appellants.

A. B. Aylesworth, K.C., for respondent.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—The facts and the findings of the learned Judge are fully set forth in his considered judgment, which was delivered on the 11th June, 1901, and it is unnecessary to repeat them.

I should have had some difficulty in coming to the conclusion that the judgment of my learned brother could be supported merely upon the ground that a new and substantial consideration passed from the respondent to the appellants for the promise made by them to pay what was owing to the respondent for the work done by him for McCrea on the drive, and that sec. 4 of the Statute of Frauds did not, therefore, apply.

Tumblay v. Meyers, 16 U. C. R. 143, and the observations of my brother Street with regard to that case in Beattie v. Dinnick, 27 O. R. at p. 295, are referred to by my brother Robertson, and were relied on by the respondent's counsel as establishing that proposition; but, looking at the whole of my brother Street's judgment and the cases referred to by him, it is plain, I think, that he did not intend to express his assent to it.

Expressions of opinion in some of the English cases, no doubt, lend support to the contention, but, as Mr. De Colyar points out (3rd ed., p. 130 et seq.), the law is otherwise, and so it was decided to be by the Court of Appeal in James v. Balfour, 7 A. R. 461. See also Barburg India Rubber Comb Co. v. Martin, 18 Times L. R. 428.

The judgment may, however, be supported upon one or other of two grounds:—

(1) That the result of the transactions between the appellants and McCrea and the respondent was that, upon the taking over by the appellants of the drive from McCrea, the appellants assumed the liability of McCrea to the respondent, and the respondent accepted the appellants as his debtors in place of McCrea, whose liability to the respondent was put an end to; in other words, on the ground of novation.

Or (2) that, assuming that McCrea's indebtedness to the respondent was not put an end to, the appellants took over the work, and the promise to the respondent was to pay the indebtedness out of the moneys coming to McCrea from the appellants, or which might come to the hands of the appellants from the other persons whose logs formed part of the drive. These moneys, according to the evidence, were turned over by McCrea to the appellants upon the express promise by them that they would pay the men who agreed to remain and did remain on the drive until it was put through or they were discharged, as the respondent did, not only the wages thereafter earned by them, but what was coming to them for the work they had done while McCrea had had charge of the drive.

In either view, the promise of the appellants was not within sec. 4 of the Statute of Frauds: *De Colyar on Guarantees*, 3rd ed., p. 81 et seq., 103; *Clark v. Wendell*, 16 U. C. R. 352.

The judgment should, therefore, be affirmed, and the appeal from it dismissed with costs.

T. H. Grout, Arnprior, solicitor for plaintiff.

Thompson & Hunt, Arnprior, solicitors for defendants,

MAY 3RD, 1902.

DIVISIONAL COURT.

WEBB v. GAGE.

Mechanics' Lien — "Owner"—Lease—Covenant by Lessee to Erect Buildings on Land.

Gearing v. Robinson, 27 A. R. 364, followed.

Appeal by defendant Gage from judgment of Master at Hamilton in action to realize a lien. In 1899 defendant Gage leased certain land to defendants the Hoepfner Company for 99 years, by indenture, which contained a covenant by lessees to build works and plant to the value of \$100,000, which, when completed, were to become the property of the defendant Gage. The plaintiff claims a lien in respect of work done and materials furnished to the buildings, and the question raised is whether, by reason of the terms of the lease, the defendant Gage is an owner within the meaning of sec. 2, sub-sec. 3, of the *Mechanics' and Wage-earners' Lien Act*. There was no evidence outside of the lease of any request by defendant Gage to plaintiff.

G. Lynch-Staunton, K.C., and W. S. McBrayne, Hamilton, for appellant.

G. H. Levy, Hamilton, for defendants the Hoepfner Company.

G. F. Shepley, K.C., and W. Bell, Hamilton, for plaintiff.
 The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Mr. Shepley conceded that unless this case could be distinguished from *Gearing v. Robinson*, 27 A. R. 364, he could not support the judgment; and he contended that the existence of the obligation imposed on the company to erect the buildings and of the provision as to their becoming the property of the appellant, neither of which existed in *Gearing v. Robinson*, made the cases distinguishable.

I am, however, not of that opinion.

As I understand the decision in *Gearing v. Robinson*, it is necessary in order to charge the interest of the appellant in the land, that the respondent should shew not only that the work was done and the materials were furnished on behalf of the appellant or with his privity or consent or for his direct benefit, but also at his request either express or implied.

Mr. Justice MacLennan said (p. 372): “Mrs. Robinson had an interest in the land, and the work was done for her at her request and upon her credit and on her behalf, etc., and there is no evidence of any request by the sub-lessors nor of any dealing of any kind between them and the plaintiff.”

Substituting for “Mrs. Robinson” the “company” and for “sub-lessors” “the appellant,” this statement of the learned Judge seems to me to apply exactly to the facts of this case.

In *Graham v. Williams*, 8 O. R. 478, 9 O. R. 458, cited with approval, it was decided that mere knowledge of or mere consent to the work being done is not sufficient, and that there must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged, to entitle the contractor to a charge on that interest.

In some of the American States a construction more favourable to the contractor has been given to Mechanics' Lien Acts, the provisions of which were somewhat like those of our Act, which are in question here, though not identical with them, but we are, of course, bound to follow the decision of the Court of Appeal of this Province in preference to those decisions; and following it the appeal must be allowed and the judgment appealed from be varied by directing the action as against the appellant to be dismissed with costs, and the respondent must pay the costs of the appeal.

Bell & Pringle, Hamilton, solicitors for plaintiff.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for the Hoepfner Company.

Biggar & McBrayne, Hamilton, solicitors for defendant Gage.

Moss, J.A.

MAY 3RD, 1902.

C. A.—CHAMBERS.

MORRISON v. G. T. R. CO.

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461—Leave to Appeal—Terms—Costs.

Motion by defendants for leave to appeal from order of a Divisional Court, *ante* p. 263.

D. L. McCarthy, for defendants.

J. G. O'Donoghue, for plaintiff.

Moss, J.A.—The precise point does not seem to have arisen since *McLean v. G. W. R. Co.*, 7 P. R. 358. The C. L. P. Act, sec. 56, was then in force, and it was decided that an engine-driver was not an officer within that section. The question arose again in a different form in *Knight v. G. T. R. Co.*, 17 P. R. 386, and it was held that an engine-driver was not an officer within the Rule then in force. On the general question as to who are and are not officers of a corporation the views of the Judges are much at variance. In view of all the circumstances, I think leave to appeal should be given. The point is said to be, and no doubt is, one of much importance, not only to the defendants but to other large railway companies, having regard to the effect given to the depositions when used at the trial under Rule 461. Defendants should bear plaintiff's costs of the appeal as well as their own, in any event.

MAY 3RD, 1902.

DIVISIONAL COURT.

LAMPHIER v. STAFFORD.

Ditches and Watercourses—Construction—Deepening—Jurisdiction of Engineer—R. S. O. ch. 285, secs. 28, 33.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for \$5 damages and an injunction. Action for damages for trespass to land by alleged unlawful entry on plaintiff's land and digging a ditch. The defendant justified his acts under the *Ditches and Watercourses Act*, R. S. O. ch. 285, and the award thereunder of the engineer of the township of Richmond, in which the land is situate. The award provides for the clearing out and pos-

sibly deepening the existing ditch on the east side of the road allowance between the townships of Richmond and Tyendinaga, and also a ditch on the land in question, part of lot 2 in the second concession of Richmond, and directs one English, the owner of the south half of lot 2, to deepen the latter ditch five inches and clean out, so as to allow the water to run freely to the road ditch, and imposes on plaintiff the duty of maintaining the latter ditch after being cleaned and deepened by English. After English had finished the plaintiff filled up the ditch. Assuming that the provisions of sec. 28 were applicable, and that he had authority under it to let the work of cleaning out the ditch directed by the award to be done by English, the engineer inspected it, and finding it filled up, assumed to let the work of cleaning out to defendant, who was proceeding to do so when stopped by the injunction in this action.

H. L. Drayton, for defendant.

A. B. Aylesworth, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—It would appear to be reasonably clear that, but for the provisions of sec. 33, all that the Act deals with is the construction and the subsequent maintenance of ditches, and “construction” is defined by sec. 3 to mean “the original opening or making of a ditch by artificial means,” and that is therefore what McHenry made his requisition for, and all that the engineer had any jurisdiction to deal with. Nor does sec. 33 help the appellant. It no doubt enables a land owner to make a requisition for the deepening, widening, or covering of an existing ditch, but the provision is not one enlarging the meaning of the word “construction” so as to make it include works of that character; it merely applies the Act to such works, and directs that the proceedings to be taken for procuring them to be done under the Act are to be the same as those which are to be taken for the construction of a ditch under the provisions of the Act.

I have searched without finding anything in the Act which empowers the engineer, when one kind of work is asked for, to direct another and different kind in whole or in part to be undertaken, and, with every desire to give to the Act the most liberal interpretation possible, I am unable to see my way to upholding the jurisdiction of the engineer to make the award and under the requisition in pursuance of which he assumed to make it.

The proceeding to let the work as was done by the engineer was unauthorized by the Act. The provisions of

sec. 28, under which he assumed to act, were, I think, clearly not applicable. The work directed by the award to be done by English on the respondent's lands had been completed by him, and the proceeding should have been, if under the Act, that provided by sec. 35 for the neglect of the respondent to maintain the ditch as directed by the award. The provisions of that section were not complied with, and the acts of the engineer and of the appellant were therefore wholly unauthorized and illegal.

I desire not to be understood as not agreeing in the other reasons assigned by the learned Chief Justice for his judgment. I have formed and express no opinion as to them, not having found it necessary for the disposition of the appeal to do so.

The appeal, in my opinion, fails and should be dismissed with costs.

Deroche & Madden, Napanee, solicitors for plaintiff.

J. English, Napanee, solicitor for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

CARR v. O'ROURKE.

Administration—Grant—Discretion of Court—Next of Kin—Persons to be Cited—Surrogate Courts Act, secs. 41, 59.

Appeal by plaintiff from judgment of Surrogate Court of Kent dismissing the action, which was brought by the brother of Daniel Carr, deceased, to revoke letters of administration of his estate granted to defendant, who is married to a niece of the deceased. Robert Daniel Payne, a nephew of deceased, had been in October, 1899, appointed committee of his person and estate. Plaintiff alleges that defendant is not one of the next of kin, and that as brother of deceased, plaintiff is entitled to administer. Daniel Carr left him surviving the plaintiff, and one sister, whose daughter is married to defendant. The Surrogate Court held that plaintiff, having for many years been a citizen of and domiciled in a foreign country, was not entitled to administer, providing that any other fit and proper person of equal degree of relationship to deceased or the appointee of such person applied, and that at all events plaintiff is practically blind, and, from age and physical infirmities, not a fit and proper person; that there was no evidence of collusion between the committee and plaintiff; and that it was not the practice to cite persons living outside the Province, where, as in this case, suitable relatives resided in it.

M. Wilson, K.C., and J. B. O'Flynn, Chatham, for plaintiff.

A. B. Aylesworth, K.C., for defendant.

The Judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Section 59 of the Surrogate Courts Act provides that in the case of a person who has died intestate, where it appears to be necessary or convenient, by reason of the insolvency of the estate of the deceased or other special circumstances, to appoint some person to be the administrator of the property of the deceased or of any part of it, other than the person who but for the provision of the section would have been entitled to a grant of administration, it is not to be obligatory upon the Court to grant administration to the person who but for the section would have been entitled to the grant, but the Court is empowered in its discretion to appoint such person as the Court thinks fit to be the administrator.

The cases decided on the analogous provision of the English Court of Probate Act, 1857 (20 & 21 Vict. ch. 77), have given a somewhat narrow construction to it, and it is possible that on the facts of this case the English Probate Court might not have exercised its discretion in favour of making the grant to the respondent.

By the provisions of sec. 41 of the Surrogate Courts Act, it is only the next of kin resident in Ontario who are required to be cited or summoned where the application is made by a person not entitled to the grant as next of kin of the deceased.

The Surrogate Court, therefore, had before it all those who are required to be cited or summoned, and the consent and request of all of them that the respondent should be appointed administrator, and, having regard to the nature of the property left by the deceased, which consisted of a farm as well as of considerable personal property which required to be looked after, and the age of Mary Payne and her illiteracy, it cannot be said, I think, that the learned Judge exercised his discretion improperly in directing the grant to be made to the respondent.

The practice of the Surrogate Courts of this Province appears to be to apply the provisions of sec. 59 more liberally than do the English Courts the corresponding provision of the English Probate Act, and I see no reason why the more liberal practice which has been adopted in this Province should not be continued.

Fraud and misrepresentation being out of the case, and the Surrogate Court having exercised its discretion in

favour of making the grant to the respondent, I doubt whether the case would be one for the revocation of the grant, even if it appeared that that discretion had been improperly exercised.

I have found no case in which since the enactment of sec. 73 of the English Probate Act, which is the corresponding section to sec. 59 of our Act, a grant has been revoked because it has appeared that it was made in circumstances which according to the practice of the Probate Court it was not usual to treat as special circumstances within the meaning of sec. 73.

Cases decided before the change in the law effected by sec. 73 was made are distinguishable, because before that change it was obligatory on the Court, in case of intestacy, to commit the administration to the next and most lawful friends of the deceased (31 Edw. III. ch. 11), or to the widow of the deceased, or to the next of his kin or to both (21 Hen. VIII. ch. 5, sec. 3), and therefore the Court had no jurisdiction to commit the administration to a stranger, but now the Court is, by sec. 59, empowered in its discretion to commit the administration to a stranger if there are special circumstances which in its opinion make it necessary or convenient to do so.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

J. B. O'Flynn, Chatham, solicitor for plaintiff.

J. B. Rankin, Chatham, solicitor for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

KEENAN v. RICHARDSON.

Bankruptcy and Insolvency—Preference—Chattel Mortgage—Attack within 60 Days—Statutory Presumption—Satisfaction of Onus—Good Faith—Notice—Knowledge.

Dana v. McLean, 2 O. L. R. 466, followed.

Appeal by plaintiff from judgment of BOYD, C., dismissing action by plaintiff, a creditor of one J. Wilson, to set aside a chattel mortgage made by him to defendant on the 19th February, 1900, alleged to have been made with intent to give an unjust preference. The defendant held a mortgage for \$7,000 on Wilson's farm, upon which interest amounting to upwards of \$1,600 was in arrear. The mortgage contained a distress clause, in the form of the schedule to the Short Forms Act, and the evidence shewed that defendant believed he was entitled to distrain for \$1,600, and

had threatened to do so when the chattel mortgage was given. This action was commenced on the 17th March, 1900.

J. P. Mabee, K.C., for plaintiff.

G. G. McPherson, K.C., for defendant.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—The onus, if insolvency of Wilson existed or was impending, was on the respondent to rebut the *prima facie* presumption of the intent to prefer which arises under sub-sec. 3 of sec. 2 of R. S. O. ch. 147.

The Chancellor was of opinion that this onus had been satisfied, and in that conclusion I agree.

Assuming that it was shewn that Wilson, when the chattel mortgage was given, was in insolvent circumstances,—for that is, I think, in some doubt on the evidence,—I agree in the findings of the Chancellor that this was not known to the respondent, and the proper conclusion upon the evidence is that reached by the Chancellor, that the chattel mortgage was made and taken in good faith and only for the purpose of securing the payment of the part of the arrears of interest which was secured by it, and for which it was believed by both parties to the transaction the respondent had an immediate right to distrain on the goods and chattels embraced in the chattel mortgage, and in order to relieve Wilson from the liability to have them distrained.

It does not appear to have been called to the attention of the Chancellor that the interest due was post diem interest, and that there was therefore no right to distrain for it, but that is, I think, unimportant, and does not affect the correctness of the conclusion that the *prima facie* presumption was rebutted and that the intent was not to prefer contrary to the provisions of the statute.

The fact that, when the chattel mortgage was given, the claim which the plaintiff was making was not to establish any debt or money liability of Wilson to her, but to have it declared that Wilson was trustee for her of certain land, or in the alternative to have it declared that she was entitled to a lien on this land for \$400, is not unimportant in determining the question of intent in favour of the respondent.

The testimony of Wilson was relied on as establishing that the chattel mortgage was given for the purpose of protecting Wilson's chattel property against the claim which was being made by the appellant against him, but it is not very satisfactory, and, as against the positive contradiction of the respondent, is quite insufficient to justify a finding that the chattel mortgage was given with that intent.

That the statutory presumption against the chattel mortgage may be rebutted, even if Wilson were insolvent, by shewing that it was given in good faith and without knowledge or notice to the respondent of the insolvency, was decided by the Court of Appeal in *Dana v. McLean*, 2 O. L. R. 466.

The appeal, in my opinion, fails and must be dismissed with costs.

MAY 3RD, 1902.

DIVISIONAL COURT.

PIMPERTON v. MCKENZIE.

Negligence—Injuries Caused by—Liability for—Duty—Volunteer.

Motion by plaintiff to set aside nonsuit entered by FALCONBRIDGE, C.J., and for a new trial in action by administratrix of estate and mother of Maurice Pimperton, deceased, to recover damages for his death. The defendant is lessee of a wharf adjoining the basin of the Rideau canal in the town of Smith's Falls, and uses a derrick erected for the purpose of unloading boats filled with coal, to be used by defendant in his business as a coal merchant. On 15th May, 1901, plaintiff's son came upon the wharf to help unload sand from a barge, whose captain had paid \$5 for the use of the wharf, when, owing, as alleged, to the negligent construction and negligent staying and management of the derrick, by the defendant, who assumed it as a volunteer, the derrick overbalanced and fell upon the plaintiff's son and instantly killed him. The derrick was sustained by guy ropes, and defendant, it is alleged, did not fasten one securely, which was untied to enable the boom to be turned to the south. The Chief Justice distinguished this case from *Collier v. M. C. R. Co.*, 27 A. R. 630, and withdrew the case from the jury at the close of the evidence on behalf of plaintiff, on the ground, that where one person charges negligence against another, the basis of the action must lie in some duty which was due by the defendant to the plaintiff; that in this case defendant had nothing to do with the unloading of the vessel, the sand was not for him, and he had not assumed any duty, but was acting as a mere volunteer.

G. H. Watson, K.C., for plaintiff.

A. B. Aylesworth, K.C., for defendant.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Having regard to the arrangement as to the use of the derrick and boom, which cast no duty upon the respondent as to the placing of them in position for use,

the evidence adduced by the appellant failed to make a case entitling her to have this question submitted to the jury.

The appellant also entirely failed to shew that the derrick and boom were improperly constructed or that they were not well fitted to perform the work they were intended to do, had they been properly managed and controlled by means of the appliances with which they were provided for that purpose.

If I am right thus far, the appellant's case as presented in her pleadings failed, but it was attempted to be supported at the trial and on the argument before us on another ground, viz., that the respondent had undertaken the duty of making fast the fourth guy rope, and that he had failed to perform that duty, and that this was the cause of the accident.

This contention also, in my opinion, failed; the testimony adduced for the purpose of shewing that the respondent undertook this duty and failed to perform it was, I think, quite insufficient to warrant a finding against him.

I have searched in vain for anything to indicate that those in charge of the work had delegated that duty to the respondent or that they relied on him to perform it. On the contrary, the witness Soper, one of the bargemen engaged on the work, according to his testimony, saw that the fourth guy rope was not tied, and apparently did and said nothing, although he knew that the result would be danger that the derrick might fall; if it was necessary to avoid that danger that the rope should be securely fastened, he would, had the respondent been the person who had undertaken the duty of doing this, either have called his attention to his neglect of his duty, or have called the attention of some one else connected with the barge to it; that he did not do so would seem to be attributable only to the fact that he did not suppose that this duty had been intrusted to or had been undertaken by the respondent.

I have assumed that, had this branch of the case been made out on the facts, the respondent would have been liable for the consequences of his failure to perform the duty he had undertaken. It is not, however, necessary to consider how far such an assumption is well founded, for on the facts, in my opinion, the appellant's case failed.

Having come to this conclusion, it follows that the ruling and judgment of the learned Chief Justice were right and the appeal fails and should be dismissed with costs.

Lavell, Farrell, & Lavell, Smith's Falls, solicitors for plaintiff.

Hall & Hall, Smith's Falls, solicitors for defendant.

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No. 18.

SNIDER, Co. J.

APRIL 28TH, 1902.

C. C. WENTWORTH.

LEADER v. SIDDALL.

Pleading—Statement of Claim—Alternative Claim—Sale or Conversion—Concise Statement of Doubtful Facts—Rule 268.

Motion by defendant to strike out of or direct an amendment of the following paragraph of the statement of claim:

On or about the 12th day of October, 1895, the plaintiff *sold and delivered to the defendant, or the defendant wrongfully converted to his own use*, one organ at the price, or of the value of, \$100.

D'Arcy Tate, Hamilton, for defendant.

S. F. Washington, K.C., for plaintiff.

SNIDER, Co. J.—By Rule 268 pleadings are to be as concise as they can be, consistently with giving a fair statement of the facts relied upon. It seems quite reasonable that, if a sale of the organ in question were alone claimed, the usual form is quite sufficient, that stating the bare fact that it was sold and delivered; or, if a conversion only were claimed, then the form for conversion would be enough. In this case the plaintiff comes to the Court and says, as he may now do under the Rules: "The defendant owes me or I am entitled to recover from him \$100, for an organ, but whether the facts are such as to establish a sale or a conversion I cannot quite say, but they amount to one or the other." Here, I think the Court and the defendant are both entitled to have under Rule 268 a concise statement of these doubtful facts, as under the circumstances in this alternative claim I think they are the material facts, and should be concisely stated, and a claim of the alternative legal right made upon them. See notes to Bullen & Leake, 4th ed., p. 12, and cases there cited; Holmsted & Langton, p. 453 et seq.

Order granted accordingly with costs to the defendant in any event of the cause.

Washington & Beasley, Hamilton, solicitors for plaintiff.

Carscallen & Cahill, Hamilton, solicitors for defendant.

OCTOBER 21ST, 1901.

DIVISIONAL COURT.

HOLMAN v. TIMES PRINTING CO.

Master and Servant — Injury to Servant—Infant—Negligence of Foreman in Requiring Machine to Run at High Speed.

Motion by plaintiff to set aside judgment of nonsuit of **MACMAHON, J.**, and for a new trial, in action for damages for injuries sustained by infant plaintiff, a boy 16 years old, while employed by defendants working at a Colt's Universal or Armory printing press, printing coupon railway tickets. The infant plaintiff's right hand was caught between the moving plate and stationary frame, crushed, and had to be amputated. In giving his evidence the infant plaintiff stated that "it may be that while my right hand was holding one of these coupons flat against the plate, I was working my left to throw off the impression, and owing to the difficulty I found in doing this, my whole attention may have been taken up with my left hand, and I forgot where my right was." The trial Judge held that the infant plaintiff was thus the author of his own wrong, and that the accident was not, therefore, as alleged, due to the action of the defendants' foreman, who insisted on having the boy run the machine at second instead of first speed, and nonsuited, following *Roberts v. Taylor*, 31 O. R. 10.

D'Arcy Tate, Hamilton, for plaintiff.

John Crerar, K.C., for defendants.

The judgment of the Court (**BOYD, C.**, **FERGUSON, J.**) was delivered by

BOYD, C.—The learned Judge who tried this case says that he would have let it go before the jury upon the evidence given for the plaintiff, had it not been for an expression used by the plaintiff at p. 9 of book, that the accident happened because he must have forgotten that his hand was on the press as it moved.

In my opinion, this is putting too much emphasis upon the words of the boy, as if there was some negligence admitted by him in not withdrawing his hand. There must have been some inadvertence, owing to the rapid action of the press, and the overworked condition of the lad, which detracted from his normal state of alertness, but I think it would be deciding contrary to the views expressed in *Scriver v. Low*, 32 O. R. 290 (not cited at the trial), to hold that the case is thereby to be concluded by the Judge against the plaintiff.

See also *Robinson v. Toronto Railway Co.*, 2 O. L. R. 18.

The nonsuit should be set aside and the case allowed to proceed to trial: cost in the cause to the plaintiff.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

Crerar & Crerar, Hamilton, solicitors for defendants.

MACLENNAN, J.A.

MAY 5TH, 1902.

C. A.—CHAMBERS.

FRANKEL v. G. T. R. CO.

Appeal—To Supreme Court of Canada—Subject Matter in Controversy \$1,000—Counterclaim for \$1,223.

Motion by defendants for the allowance of the bond on their appeal from the judgment of the Court, *ante* p. 254.

H. E. Rose, for defendants.

James Baird, for plaintiffs.

MACLENNAN, J.A.—The plaintiffs have no objection to the bond, but object that no appeal lies by reason of the Act of the Dominion 60 & 61 Vict. ch. 34, sec. 1, which enacts that no appeal shall lie from any judgment of this Court to the Supreme Court of Canada except in certain cases, unless special leave of this Court or of the Supreme Court is obtained, which has not been done.

Mr. Baird contends that the case is not within any of the clauses making an appeal competent; while Mr. Rose says it is within clauses (c) and (f), inasmuch as the matter in controversy on the appeal exceeds the sum or value of \$1,000 as explained in the latter of these two clauses.

The plaintiffs claimed \$1,500 damages for delay in delivery of a large quantity of iron carried by them for the plaintiffs, the damages being caused by a fall in the price of the iron between the time when it ought to have been delivered and the time of its actual delivery.

The defendants, besides denying the charge of non-delivery in due time, counterclaimed for demurrage for the use of their cars on which the iron was loaded for several months, and for this they claimed \$1,223.

The trial Judge gave judgment for the plaintiffs for \$1,000, estimating the damage upon the fall of price between the time when delivery should have been made and the time of actual delivery, and he dismissed the counterclaim.

The defendants appeal to this Court, which allowed the appeal by limiting the damages to the fall in price during

a considerably shorter time than that fixed by the trial Judge, to be ascertained upon a reference. The defendants contended in this Court that the judgment dismissing their counterclaim was erroneous, and their appeal was dismissed.

The plaintiffs' counsel on the argument before me said the plaintiffs' claim in the reference would be less than \$1,000, but I think I cannot act upon that statement. Their claim in their pleading was \$1,500, and, although the judgment which they recovered was only \$1,000, I am unable to see that they would be limited to that sum upon the reference under the present judgment.

I therefore think that the matter in controversy in this appeal, on the plaintiffs' claim, exceeds the sum or value of \$1,000 within clause (e) of the Act.

But, however that may be, I think it is a sufficient answer to the plaintiffs' objection, that the defendants' claim upon their counterclaim is the same in their proposed appeal to the Supreme Court as it was at the trial and in the appeal to this Court, namely, the sum of \$1,223, and that being so, they are entitled to appeal without leave.

I overrule the objection and allow the bond.

MACLENNAN, J.A.

MAY 6TH, 1902.

C. A.—CHAMBERS.

HAYNES v. EDMONDS.

Appeal—To Court of Appeal — Surrogate Court Case — Divisional Court—Further Appeal.

An appeal by a party to the Court of Appeal from an order of a Divisional Court dismissing his appeal from a judgment of a Surrogate Court does not lie. *McVeain v. Ridler*, 17 P. R. 353, applied.

Motion by plaintiff to quash an appeal by defendant from order of a Divisional Court dismissing his appeal from judgment of a Surrogate Court admitting to probate a paper propounded as a will.

J. E. Jones, for plaintiff.

W. J. Tremear, for defendant.

MACLENNAN, J.A.—I am of opinion that there is no right to bring this appeal, and that it should be quashed.

Section 36 of the Surrogate Courts Act gives an appeal from judgments of a Surrogate Court to a Divisional Court of the High Court, instead of to the Court of Appeal, as the law was prior to 58 Vict. ch. 13, sec. 45. And this right of appeal is also embodied in the Judicature Act, R. S. O.

ch. 51, sec. 75, sub-sec. 4. The immediately preceding section of the Judicature Act, namely, sec. 74, declares that "there shall not be more than one appeal in this Province from any judgment or order made in any action or matter, save only at the instance of the Crown, in a case in which the Crown is concerned, and save in certain other cases hereinafter specified."

Then follows sec. 76, which enacts that, subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order, or decision of the High Court, whether the judgment, order, or decision was that of a Divisional Court or of a Judge in Court. Mr. Tremear very properly relied on this section as in express terms giving an appeal in the present case, unless it could be shewn that it is excepted somewhere in the Act. I think it is clearly excepted, and that that exception is to be found in the following sec., 77, as amended by 62 Vict. (2) ch. 11, sec. 27. That section as amended enacts that: "(1) An appeal shall not lie from any judgment or order of a Divisional Court except as hereinafter provided. (2) In case a party appeals to a Divisional Court of the High Court in a case in which an appeal lies to the Court of Appeal, the party having so appealed shall be entitled afterwards to appeal from the Divisional Court to the Court of Appeal upon obtaining leave so to do as hereinafter provided, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the Divisional Court without obtaining such leave." The right of appeal to this Court from a Divisional Court, given by this sub-sec. 2, is expressly confined to cases in which an appeal would have lain on the first instance to this Court, which this is not. And the right given to apply for leave to appeal to this Court given by sub-sec. 3 in like manner is confined to judgments or orders of a Divisional Court pronounced on an appeal in a cause or matter in the High Court.

It is therefore clear that an appeal from a judgment of a Divisional Court given upon an appeal from a Surrogate Court, under the Surrogate Courts Act, sec. 36, is not within the exception to sec. 77, sub-sec. 1, and that such an appeal does not lie.

In the case of *McVeain v. Ridler*, 17 P. R. 353, cited by Mr. Jones, this Court in 1897 quashed an appeal in a County Court action from a judgment of a Divisional Court on the ground that no appeal lay either with or without leave. No distinction can be suggested between an appeal in a County

Court case and a case in the Surrogate Court with reference to the question now before me.

The motion to quash must therefore be granted.

Maxwell & Maxwell, St. Thomas, solicitors for plaintiff.

J. A. Robinson, St. Thomas, solicitor for defendant.

MAY 6TH, 1902.

DIVISIONAL COURT.

CLEMENS v. BARTLETT, FRAZIER, & CO.

Execution—Agreement to Work Farm and Share Profits—Partnership — Right of Sheriff to Seize Interest of one Partner in Grain, but not to Take it out of Possession of Other Partner.

Ovens v. Bull, 1 A. R. 62, followed.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff in an interpleader issue as to the right to the proceeds of certain grain and chattels seized by the sheriff of the county of Waterloo. The defendants are execution creditors of John H. Thamer, who absconded from the country in May, 1901. The trial Judge found as facts that in 1894 the plaintiff owned two farms and had an auction sale of about \$2,500 worth of chattels, etc. Of these Thamer, then 21 years of age, plaintiff's nephew and adopted son, and who was living with him, bought \$900 worth, but did not pay for them, and during the subsequent years worked one of the farms on shares with the plaintiff, who remained in possession; that at the time Thamer left he owed plaintiff \$3,400; that certain grain had been held over and not sold, but the balance had been sold and proceeds appropriated by Thamer; and that at the time of the seizure the plaintiff, being a partner and in possession, was entitled to the grain, and that the goods had always been the property of plaintiff under his agreement with Thamer, who pursuant to it had from time to time replaced worn out articles.

F. Arnoldi, K.C., for defendants.

E. P. Clement, Berlin, for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) held that the judgment below was right and should be affirmed. The chattels never became the property of Thamer. The agreement constituted the plaintiff and Thamer partners, for, though nothing was said about losses, profits only having been provided for, there being no contrary intention shewn, it amounted to an agreement to share losses: Lindley on Partnership, 5th ed., p. 12 et seq. The

sheriff had, no doubt, the right under the attaching order to seize the grain, but no right to take it out of the possession of the plaintiff, and nothing but Thamer's interest in it could be sold: Lindley, p. 356 et seq. The issue is not to try the right of Thamer to a share of the property seized, but to the property itself, and plaintiff is therefore entitled to succeed, because it is partnership property. *Ovens v. Bull*, 1 A. R. 62, is, on the facts, a conclusive authority in support of the judgment below on the issue as to the grain. Appeal dismissed with costs.

Bowlby & Clement, Berlin, solicitors for plaintiff.

Arnoldi & Johnston, Toronto, solicitors for defendants.

MAY 5TH, 1902.

DIVISIONAL COURT.

McCAULEY v. BUTLER.

Solicitor—Costs—Collusive Settlement of Action—Notice of Lien.

Appeal by defendant from order of FERGUSON, J., ante p. 72.

A. B. Cox, London, for appellant.

G. C. Gibbons, K.C., for respondent.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—I am of opinion that my learned brother's judgment is right, and that for the reasons given by him the notice was sufficient in point of form, and that it operated as notice to the appellant from the time it was communicated to his solicitor.

With regard to the latter point, it was strongly urged by Mr. Cox that it would be unreasonable to treat a notice given to a solicitor as a notice to the client from the time it was given to the solicitor, when, as in this case, it could not have been communicated to the client by post before the payment over of the money, or it might be in another case that it could not be communicated in time even by telegraph or any other means, but it appears to me that such a rule is not unreasonable and works no hardship upon the client, for he need not enter into or complete the compromise until he has communicated with his solicitor and has ascertained from him whether there is anything to prevent his safely doing so.

There is in the evidence, however, much to indicate that the money was not paid over by the appellant to the plaintiff until at all events the last day of September. It may

be that the money had passed out of the hands of the appellant into the hands of Hodgins and Fox before then, but there is much to lead to the conclusion that it was held by them not for the plaintiff but for the appellant. The receipt that was given by the plaintiff for the \$500 and is dated 31 (sic) September, 1901, is more consistent with this than with the opposite view, and it is significant that in the affidavit of the appellant the statement is not that \$200 was paid to the plaintiff but to Fox on the 14th September, and not that \$300 was paid to the plaintiff but to Hodgins on the 16th September, and it is reasonably clear, I think, that Hodgins and Fox were acting for the appellant in the transaction, rather than for the plaintiff.

I should also upon the evidence come to the conclusion that Fox was the agent of the appellant to do what he did in London on the 14th September, and that on that day he received notice of the respondent's claim to a lien for his costs, which in that case would of course be notice to the respondent, and I am very much inclined to think that Fox communicated to the appellant what the respondent said to him about the costs, on his return to Lucan, and before the last \$300 was paid to Hodgins. There is also, I think, much to justify the suspicion, and perhaps the finding, that the course which was adopted by the parties with regard to the compromise and the carrying of it out was designed to place matters in such a position that the respondent would be compelled to accept what Fox thought to be a reasonable sum for his costs.

The appeal, in my opinion, fails and should be dismissed with costs.

MAY 8TH, 1902.

C. A.

REX v. DAOUST.

*Criminal Law—Evidence—Prisoner as Witness—Cross-examination
—Contradiction.*

In Canada, a prisoner who is examined on his own behalf may properly be cross-examined as to whether he has been previously convicted. If he refuses to answer or denies any conviction, it may be proved against him.

Case stated by the Judge of the County Court of Carleton. The defendant was charged and tried summarily by the Judge for the robbery of a sum of money from one Gravelle. The accusation or indictment of the prisoner

did not charge him with any previous conviction. Witnesses were examined on both sides, and the prisoner, on being examined on his own behalf, denied that he was guilty, and upon being asked, and the questions objected to, whether he had several times previously been convicted of indictable offences, admitted five previous convictions. No evidence of good conduct of defendant was adduced, and the Judge convicted, certifying that the evidence of the previous convictions had effect upon his mind in arriving at a decision. The question submitted to the Court was whether the evidence of the previous convictions was properly admitted.

E. Mahon, Ottawa, for defendant.

J. R. Cartwright, K.C., and Frank Ford, for the Crown.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) held as follows:—When the Canada Evidence Act, 1893, was introduced, it had long been the law, as now found in sec. 695 of the Criminal Code, 1892, that a witness might be questioned as to whether he had been convicted of any offence, and if, upon being so questioned, he either denied the conviction or refused to answer, “the opposite party” might prove such conviction by a certificate of the proper officer in manner and form prescribed by sec. 694 and by proving the identity of the witness as such convict. The right and, if such it can be called, the privilege of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and, except in so far as he may be sheltered by some statutory protection, he is in the same situation as any other witness as regards liability to and extent of cross-examination. The Imperial Criminal Evidence Act, 1898, carefully provides that a person charged and called as a witness on his own behalf shall not, except under certain specific circumstances, be asked, and if asked shall not be required to answer, questions tending to shew that he has committed or been convicted of or charged with any offence other than that wherewith he is then charged, or is of bad character. This may have been done out of tenderness for the accused, who may feel himself, as he no doubt in most cases is, under a sort of moral compulsion to give evidence for himself, the Act having removed his previous disability in that respect, or it may have been in order to avoid any even apparent inconsistency with the provision corresponding to that of sec. 676 of the Criminal Code which deals with the proceedings upon an indictment for committing an offence after a previous conviction or

convictions. There the prisoner is to be arraigned in the first instance upon so much only of the indictment as charges the subsequent offence, the trial of the question as to previous convictions being deferred until he shall have been found guilty of that offence. Our Criminal Evidence Act contains no section corresponding to this of the Imperial Act, the only exception it makes to the competence of the accused to testify being in respect of communications made by husband to wife or by wife to husband during their marriage.

Practically, therefore, although the provisions of sec. 676 must be complied with, whenever it is intended for the purpose of imposing an increased punishment to try the question whether the accused has been convicted of previous offences, he incurs the risk, if he chooses to testify on his own behalf, of having such conviction proved against him for the purpose of affecting his credit and thereby incidentally prejudicing his position with the jury in regard to the charge then on trial, a risk which by the Imperial Act it has been deemed proper to exclude.

In the case before us the questions were proper, and the testimony they were intended to elicit relevant to the issue as going to the credit of the witness and as authorized by sec. 695 of the Code. The accused, instead of refusing to answer, stated without objection what was probably the truth. Had he denied the facts or refused to answer, the only consequence would have been that the Crown might have proved the previous conviction in the manner above stated. It is therefore clear that evidence of this conviction by the accused's own admissions was proper, and it was open to the Judge to draw therefrom any inference favourable or unfavourable to the accused, of which it was justly susceptible.

MAY 8TH, 1903.

C. A.

REX v. HANRAHAN.

Criminal Law—Common Betting House—Incorporated Association's Race Track—House thereon of Joint Stock Company—Criminal Code, secs. 197, 198, 204.

Case stated under the provisions of sec. 744 of the Code, by the police magistrate for the city of Windsor, as to whether he was right in convicting defendant under secs. 197 and 198 of the Code for unlawfully keeping a disorderly house, that is, a common betting house. It was

shewn before the magistrate that a house was used and kept for betting between persons resorting thereto, and the keeper, and that defendant appeared to be the person having the management, and was therefore found to be the keeper; that the house was owned by a joint stock company called "The Essex Racing and Athletic Club," of which defendant is president, and is situate on the race track of the Windsor Driving Park, a duly incorporated association; that on the date stated in the information about 200 people were in the house, and about 30 of them were betting with defendant and his assistants upon races in Morris Park, New York State, and on other races on the local track, the latter races being conducted by the club under agreement with the association.

E. F. B. Johnston, K.C., for the defendant.

J. R. Cartwright, K.C., and Frank Ford, for the Crown.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) held as follows:—The house was owned by a joint stock company, but the defendant was found to be the keeper of the house, and it was found that the house was kept and used at the time and place charged in the information for the purpose of betting between persons resorting thereto and the keeper thereof, and it was also found that there were there a number of persons betting with the accused and his assistants, some of them upon horse races then in progress in Morris Park in the State of New York, and others upon horse races then in progress upon a local race track, which latter were being conducted by the Essex Racing and Athletic Club.

What is struck at by secs. 197 and 198 is the keeping of a common betting house for any of the purposes mentioned in clauses (a), (b), (c), and (d) of sec. 197. The first clause (a) deals with the keeping of such a house for the purpose of betting in any manner between the persons resorting thereto and the different classes of persons specified in items (i), (ii), (iii), and (iv) of that clause, as owners, keepers, and managers, etc., thereof. The other clauses define other purposes connected with betting, which, if a house is kept therefor, will constitute it a common betting house, and therefore a disorderly house, but with these, as I have said, we are not now concerned, as the conviction does not proceed upon them. I only note them in order to emphasize the fact that the offence dealt with by the whole section is the keeping of a house, office, room, or other place for the prescribed purposes. This being so, the facts found bring the defendant clearly within its danger, and he was

rightly convicted. It was strongly urged on his behalf that he had done nothing but what is permitted by sub-sec. (2) of sec. 204 of the Act. That section, however, whatever may be its scope, and whether some of the acts forbidden by it might be evidence of an offence under sec. 197 or not, stands by itself. It is enough to say that the exception contained in sub-sec. (2) is expressly limited to the first part of the section, and there is no ground for reading it into sec. 197. There is nothing in sec. 204 of the Code which warrants an implication that a common betting house may be kept on the race-course of an incorporated association during the actual progress of a race meeting. See *Walsh v. Trebilcock*, 23 S. C. R. 695.

J. W. Hanna, Windsor, solicitor for defendant.

MAY 8TH, 1902.

C. A.

FALLIS v. GARTSHORE-THOMPSON PIPE
FOUNDRY CO.

Negligence—Injury to Person—Unsafe Condition of Premises—Accident of Unheard of Nature—Findings of Jury.

Motion by defendants to set aside verdict of jury for \$400 and judgment of MACMAHON, J., entered thereon in action for \$5,000 damages for injuries. The plaintiff was employed as a teamster by A. D. Garrett & Co., coal merchants, Hamilton, and while delivering coal and coke on defendants' premises he was struck in one eye by a chip from an iron pipe, upon which, about 10 feet from plaintiff, an employee of defendants was engaged with a hammer and chisel. The jury (10 of them agreeing) found that the injury was caused by a chip of iron from the pipe resulting from the dangerous condition of the defendants' premises, and that the danger would have been obviated by a movable or stationary screen.

J. Crerar, K.C., for defendants.

J. W. Nesbitt, K.C., for plaintiff.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, J.J.A.) held as follows:—The defendants owed a duty to the plaintiff and others to be careful and guard them from injury. There was evidence upon which the jury might find as they did, and the result of their finding is that, as regards this plaintiff, the premises were dangerous, and defendants were negligent. No complaint is made of the charge.

The case is governed by the principles of law laid down in *Indermaur v. Dame*, L. R. 1 C. P. 274, 2 C. P. 311, and other kindred cases.

MAY 8TH, 1902.

C. A.

MONTREAL AND OTTAWA R. W. CO. v. CITY OF OTTAWA.

Railway—Right to Cross Streets—"At or near" City—Expropriation Proceedings or Compensation—Necessity for—Extension of City Limits—Acquisition of Toll Road.

Appeal by defendants from judgment of BOYD, C., 2 O. L. R. 336.

A. B. Aylesworth, K.C., and Taylor McVeity, Ottawa, for appellants.

Wallace Nesbitt, K.C., and W. H. Curle, Ottawa, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) were unanimous in dismissing the appeal.

MOSS, J.A.—The plaintiffs are authorized by 47 Vict. ch. 84 (D.) to lay out, construct, and finish a railway from a point on the Grand Trunk Railway of Canada in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario. . . . Having regard to the subject-matter, I think the word "at" should be taken inclusively. And it seems to me there is nothing unreasonable in rendering the words "a point at the city of Ottawa" as "a point in the city of Ottawa." It must be conceded that if the language of the Act enables the plaintiffs to construct their line to a point in the city, that carries with it the right to go through or across the city to reach that point, unless that method of reading it would be manifestly unreasonable in view of all the circumstances. Besides, the Act authorizes the plaintiffs to connect their railway with any other railway at or near Ottawa, and if for the purpose of making such connection it was necessary for the plaintiffs to carry their line across the city, why should not this be done?

Next, the defendants say that if plaintiffs are authorized to construct their line through or across the city, what is being done is not in furtherance of that design, but is nothing more than the laying of a short curve or link from the main line of the Canadian Pacific Railway to the line of the St. Lawrence and Ottawa Railway Company, a line

also controlled by the Canadian Pacific Railway Company. There is nothing in the Act of incorporation to prevent the work of connection from being commenced at either end, and the evidence, as well as the plan, profile, and book of reference, shews that the intention is to complete the work within the time limited by the last Act. Other questions may arise in the event of that not being done, but at present there appears to be no objection to the plaintiffs proceeding in the way they have been. . . .

No mention is made in the Act of incorporation of the county of Carleton, but if, for the purpose of reaching their point in the city of Ottawa, or of making connection with another railway at or near the city of Ottawa, it becomes necessary to take the line into the county of Carleton, the plaintiffs' Acts, by implication, give power to do so.

The defendants next take the ground that the plaintiffs are not entitled to enter upon the Richmond road, or use it for the purposes of their railway, without first taking steps to acquire by agreement or expropriation a right of way over it, and make compensation to the defendants therefor, because the part of the road in question is the private property of the defendants, and is not held by them as ordinary public highways are. . . . Under 51 Vict. ch. 53, the defendants, in 1888, paid to the Bytown and Nepean Road Company \$1,170 as compensation for the portion of the Richmond road embraced within the enlarged limits of the city, but no conveyance or transfer was executed to the defendants, and since that time the road has apparently been used by the defendants in the same way as the other streets of the city. . . . The highest effect that can be given to the transaction of 1888 is that the interest of the road company was extinguished, and the highway was restored to the municipality of the defendants, which had acquired territorial jurisdiction over that part of the municipality of Nepean embracing the portion of the road in question. The highway in question is not the private property of the defendants, nor to be regarded in the sense that property acquired and held for a city hall or a market house, or property like that in question in *Re Bronson and Ottawa*, 1 O. R. 415, is to be regarded.

Lastly, the defendants contended that, even if the Richmond road is to be considered as an ordinary highway, under the Railway Act a railway company is not entitled to cross it in the line of its railway without the defendants' consent, save on condition of making monetary compensation to defendants and assuming the maintaining of the

highway at the crossing, as well as submitting to such terms and conditions as may be imposed by the Railway Committee. I am unable to find in the Railway Act, or in any other enactment, any warrant for this claim. . . . The municipality may in some cases secure terms from the Railway Committee, but no provision is made for ordering monetary compensation for the user of the highway involved in crossing it at rail level. This privilege of crossing does not appear to fall within any of the classes of interests for which compensation is provided under secs. 132 to 172. In no case that I am aware of has a claim for compensation to a municipality for the user of a highway by a railway, arising from the mere crossing in the line of railway, been presented or countenanced. *Sydney v. Young*, [1898] A. C. 457, *Donnaher v. State of Mississippi*, 8 Sm. & M. 649, and *Dillon on Municipal Corporations*, 4th ed., p. 834 n., referred to.

Scott, Scott, & Curle, Ottawa, solicitors for plaintiffs.

Taylor McVeity, Ottawa, solicitor for defendants.

MAY 9TH, 1902.

DIVISIONAL COURT.

CANADIAN BANK OF COMMERCE v. ROLSTON.

Execution—Equity of Redemption—Dower—Election—Right to Estate in Land—Assign—Tenant in Common—Practice—R. S. O. ch. 77—Rules 1016, 1017, 1018.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing action for the aid of the Court as to certain executions issued by plaintiffs against defendant out of a Division Court, wherein plaintiffs had recovered judgment for \$162.65 and \$40.20 respectively against defendant, who is a widow, and is entitled to dower in certain land of her late husband, or to an undivided one-third share or interest therein, subject to a mortgage made by him for \$175. The defendant on her examination for discovery declined to say whether she would elect to take dower in or one-third absolutely of her husband's estate. The trial Judge held that defendant had an interest in land saleable under secs. 29, 30, and 31 of the Execution Act, R. S. O. ch. 77.

H. J. Scott, K.C., for appellants.

M. H. Ludwig, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—In whichever way the widow elects, her interest is not saleable by the sheriff under a *fi. fa.* If she,

under the Devolution of Estates Act, elects in favour of an undivided third share in the equity of redemption, she becomes tenant in common of the equity of redemption with her children, and her share cannot be sold under a *fi. fa.*: *Heward v. Wolfenden*, 14 Gr. 188; *Cronn v. Chamberlin*, 27 Gr. 551; *Samis v. Ireland*, 4 A. R. 118. If she elects to retain her dower, there is no authority under the statutes in a sheriff to sell her dower in an equity of redemption.

Prior to the passing of the section now represented by sec. 33 of ch. 77, R. S. O., it had been held that the right of a widow to dower which had not been set apart and ascertained was not saleable under *fi. fa.* by the sheriff, but that the section in question included such a right: *Allen v. Edinburgh Life Assce Co.*, 25 Gr. 306. But sec. 33 is to be read in connection with secs. 29 to 32, under which equities of redemption are dealt with, and an interest in an equity of redemption which comes within sec. 30, as well as within sec. 33, may, under the combined effect of those sections, be sold by the sheriff under *fi. fa.*, unless such a sale would offend against the limitations imposed upon such sales by the principles laid down in *Heward v. Wolfenden*, *Cronn v. Chamberlin*, *supra*, and that class of cases. But a widow having a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject, is not possessel of an estate in the land, and is not therefore an "assign" of her husband, nor a "person having the equity of redemption," within the meaning of sec. 29, for it does not follow that a person entitled to redeem a mortgage is necessarily an owner of the equity of redemption in the land mortgaged. The interest of the defendant as dowress in an equity of redemption does not therefore appear to come within sec. 30, and is therefore not saleable under it nor under sec. 33. If, however, the widow is to be treated as one of the owners of the equity of redemption, then still her interest is not saleable by the sheriff because a sale of her interest would offend against the principles of *Heward v. Wolfenden*, *supra*.

The result is that, in my opinion, there was and is no right to sell this interest under execution in the ordinary manner.

But Rules 1016, 1017, and 1018 offer a summary method of reaching an interest of this nature which should have been adopted, instead of bringing a new action. Order made declaring plaintiffs entitled to a charge upon the

estate or interest of the defendant in the lands in question and that same be sold. Reference to Master at Walkerton. Costs subsequent to judgment to plaintiffs. No costs of appeal. Scale of costs to be that of County Court unless the interest of defendant sells for a larger sum than \$400, in which case scale to be that of High Court.

David Robertson, Walkerton, solicitor for plaintiffs.

Frank J. Palmer, Walkerton, solicitor for defendant.

MACLENNAN, J.A.

MAY 10TH, 1902.

C. A.—CHAMBERS.

MURRAY v. WURTELE.

Costs—Appeal—Parties—Added Plaintiff.

Motion to settle certificate of judgment noted *ante* p. 298. The facts sufficiently appear in the judgment.

J. E. Jones, for defendants, appellants.

A. B. Aylesworth, K.C., for plaintiff Fraser.

MACLENNAN, J.A.—The question is whether Fraser ought to be ordered to pay the costs of the appeal. I have read and considered all the papers, and I see no ground on which Mr. Fraser can be released. The order of 22nd December recites that it was made upon Mr. Fraser's application to vary a previous order of 13th November, 1900, and for leave to be added as a party plaintiff. His consent to be added reads "to be added as a party plaintiff and to assume responsibility of carrying on the same from 22nd December, 1900." The order of 13th November stayed all proceedings in the action (19 P. R. 293), and, but for Mr. Fraser's application, the action could not have proceeded further, and no appeal by the defendants would have been necessary. By Mr. Fraser's intervention the stay was removed, and it became necessary for the defendants to appeal against the judgment, which they have done successfully. If the judgment had stood, Mr. Fraser would have had the benefit of it, for as purchaser of the note sued on the judgment was his property. The original plaintiff had no interest in resisting the appeal, except as to costs, and the whole substantial interest was in Mr. Fraser. Under these circumstances, notwithstanding that he did not appear by counsel on the argument, I think he cannot be relieved from payment of the costs of the appeal.

FALCONBRIDGE, C.J.

MAY 10TH, 1902.

TRIAL.

DECKER v. CLIFF.

Life Insurance—Assignment of Policy—Insurable Interest—Creditor.

Action by the infant son and the administratrix of the estate of Robert J. Decker, deceased, to have it declared that they are entitled, subject to the claim of defendant as a creditor of deceased, to the proceeds of a policy of insurance on his life issued by the Home Life Assurance Company, who have paid the money into Court. The policy was in favour of deceased's wife, who predeceased him, and at her death Decker assigned the policy to defendant, who claims to be the sole beneficiary.

J. R. Roaf, for plaintiff.

G. M. Macdonnell, K.C., and J. M. Farrell, Kingston, for defendant.

FALCONBRIDGE, C.J.—The defendant paid no money to the deceased at the time of the assignment, and the defendant filled in the blank line in the assignment for describing the relationship—"creditor, etc." In this way only could defendant have complied with condition 11 indorsed on the policy, "an insurable interest existing at the time of the assignment must be shewn." The deceased was *inops consilii*, and was parting with his sole asset. The defendant cannot now be heard to set up his present contention, and must be declared to be a trustee for plaintiffs of the policy, and they are entitled to its amount, less the indebtedness, if any, due to defendant and the amounts paid by him for premiums, with simple interest. Reference to Master at Walkerton. Costs up to judgment to plaintiffs. Further directions and subsequent costs reserved.

Roaf & Roaf, Toronto, solicitors for plaintiffs.

Macdonnell & Farrell, Kingston, solicitors for defendant.

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MAY 13TH, 1902.

DIVISIONAL COURT.

AITCHISON v. McKELVEY.

Specific Performance—Agent—Fraud—Amendment—Delay.

An appeal by defendant from judgment of FALCONBRIDGE, C.J., ante p. 51, was dismissed with costs, on the ground that the evidence supported the findings. (BOYD, C., MEREDITH, C.J.)

FALCONBRIDGE, C.J.

MAY 13TH, 1902.

TRIAL.

LINDSAY v. STRATHROY PETROLEUM CO.

Estoppel—Rent—Claim for, by President of Company—Annual Statements of Assets and Liabilities.

Action by William B. Lindsay, physician, of Strathroy, against the company to recover \$3,300, the amount of a promissory note given for money lent, \$300 for services as manager, and \$364 for use and occupation of an office. The defendants paid \$3,617.91 into Court, and defended as to the office rent.

J. Folinsbee, Strathroy, for plaintiff.

I. F. Helimuth and C. H. Ivey, London, for defendants.

FALCONBRIDGE, C.J., found that plaintiff was president of the company, and statements of assets and liabilities were submitted at successive annual meetings, and no reference was made to any claim of his or liability of the company in this regard. Plaintiff never formally put forward any claim until after he was removed from the office of president.

Judgment to be entered after 12th June next declaring that the amount paid into Court is sufficient to satisfy the plaintiff's claim, and directing payment of the money in Court to plaintiff. Defendants to pay plaintiff's costs up to payment into Court. No costs to either party after payment into Court.

J. Folinsbee, Strathroy, solicitor for plaintiff.

Ivey & Dromgole, London, solicitors for defendants.

FALCONBRIDGE, C.J.

MAY 13TH, 1902.

TRIAL.

STRATHROY PETROLEUM CO. v. LINDSAY.

*Unversion—Retention of Books and Papers of Company by President
—Unreasonable Refusal to Give Up.*

Action for return of books and papers of the plaintiffs and for damages for wrongful detention. The defence was that the defendant was ready and willing to give up the books, etc., and that the action was unnecessary.

I. F. Hellmuth and C. H. Ivey, London, for plaintiffs.

J. Folinsbee, Strathroy, for defendant.

FALCONBRIDGE, C.J., held that the conditions imposed by defendant or his agent as to particularity of receipt, etc., were not reasonable, and amounted to refusal, as did also his former attitude in the premises.

Judgment for plaintiffs for \$4 damages. Plaintiffs to have costs up to delivery of statement of defence. Otherwise no order as to costs. "Thirty days" stay.

Ivey & Dromgole, London, solicitors for plaintiffs.

J. Folinsbee, Strathroy, solicitor for defendant.

MACMAHON, J.

MAY 14TH, 1902.

TRIAL.

LEWIS v. ELLIS.

Solicitor and Client—Liability of Solicitor as to Investment of Client's Money—Guaranty.

Sutton v. Grey, [1893] 1 Q. B. 285, distinguished.

Action against a solicitor for an account of moneys placed in his hands for investment upon mortgages of real estate. The plaintiff alleged that the defendant had guaranteed some of the investments.

M. Wilson, K.C., and A. H. Clarke, Windsor, for plaintiff.

W. M. Douglas, K.C., for defendant.

MACMAHON, J.—The plaintiff relied on two letters written to him by the defendant as containing a guaranty. In the first letter the defendant says, "I would be willing to vouch for any loan that I put through." And in the second letter, five months later, he says: "As to my guaranteeing investments made through me to your friend, all I can say is that I would guarantee loans made by me both as to title and valuation unless I stated to the contrary."

There is certainly no guaranty contained in either of the letters, and the plaintiff is in error in supposing that there existed any other letter from the defendant guaranteeing the loan. Even assuming that these letters afforded evidence of a verbal guaranty, that is not of any avail to the plaintiff, as, by no possible stretch of the imagination, could the defendant be said to come within the case of *Sutton v. Grey*, [1893] 1 Q.B. 285. In that case it was held that, although the contract was not in writing, the action was maintainable, because the defendant had an interest in the transactions equally with the plaintiffs, and therefore the contract was not within s. 4 of the Statute of Frauds. In the present case the defendant had no interest whatever in the lending of the money, except the solicitor's fee and any fee charged for valuation, both of which were paid by the borrower. There was no neglect of duty by the defendant, but every care was exercised by him in making the valuations, and the then marketable value of each of the properties, as stated by him, was amply sufficient to justify the advance made on the mortgage in each case. Action dismissed with costs.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for plaintiff.

Ellis & Ellis, Windsor, solicitors for defendant.

MAY 13TH, 1902.

DIVISIONAL COURT.

GODBOLD v. GODBOLD.

Executor—Insolvency—Administration of Estate by Court—Motion for—Undertaking to Pay into Court—Costs.

Appeal from order of MEREDITH, J., ante p. 233. The same counsel appeared.

THE COURT (BOYD, C., MEREDITH, C.J.) held that no reason had been shewn for ordering administration by the Court or for the appointment of a receiver. The order below went further even than was necessary in the plaintiffs' favour. There is now a discretion in the Court to grant or refuse administration, and the Court should not interfere where the administration is in competent hands. Nothing to the executor's discredit is now shewn which was not known to the testator when he appointed him executor. The executor has no property, but has paid his debts, and cannot be considered insolvent; he is apparently an honest man. His refusal to allow the plaintiffs to see the will before it was proved, is not material, and is not evidence of any want of good faith. There is nothing to shew that he

will not act fairly and distribute the property. The undertaking of the executor should be varied so as to be effective. Appeal dismissed with costs, but order varied so as to add to the undertaking the requirement that he shall collect with due diligence.

MAY 12TH, 1902.

DIVISIONAL COURT.

GRAHAM v. BOURQUE.

Contract—Breach—Absolute Refusal to Perform.

Appeal by plaintiff from judgment of LOUNT, J., ante p. 138.

The same counsel appeared.

THE COURT (BOYD, C., MEREDITH, C.J.) varied the judgment below by reducing the defendants' recovery on their counterclaim to \$75. Judgment for plaintiff with costs for \$958.05 (less amount paid into Court), and for payment out to plaintiff of amount paid into Court, and for defendants for \$75 with costs. Judgments to be set off pro tanto. No costs of appeal to the Court below or to this Court.

MAY 13TH, 1902.

DIVISIONAL COURT.

REX v. MCGREGOR.

Municipal Corporation—By-Law for Prevention of Fires—Ejusdem Generis Rule—Storing Combustible or Dangerous Material—Oils—Petroleum Inspection Act, 62 & 63 Vict. ch. 27, does not Supersede Provincial Legislation on Same Subject—The Latter Confers Power to Make Police or Municipal Regulations of Local Character for Prevention, etc., of Fires.

Hodge v. The Queen, 9 App. Cas. at p. 131, followed.

Motion by defendant to make absolute a rule nisi to quash conviction of defendant by the police magistrate for the city of Windsor, for that defendant, "agent of the Queen City Oil Company, did keep at one time in a house or shop within the city limits a larger quantity than three barrels of coal oil, rock oil, water oil, or other similar oils, and a larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or other combustible or dangerous material, contrary to the city by-law for prevention of fires and other purposes therein mentioned."

G. F. Shepley, K.C., for defendant. The by-law is *ultra vires*, not being within any of the powers conferred by sec. 542 of the Municipal Act; and sub-sec. 17 of sec. 542 is *ultra vires*. The *ejusdem generis* rule should be applied to

the words "and other combustible or dangerous materials," and they therefore apply only to articles or things which are combustible or dangerous as gunpowder is, and they must therefore be confined to explosives.

W. M. Douglas, K.C., for prosecutor.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.,) was delivered by

MEREDITH, C.J.—*Anderson v. Anderson*, [1895] 1 Q.B. 749, *Re Stockport Co.*, [1898] 2 Ch. 687, 696, and *Parker v. Marchant*, 1 Y. & C. C. 290, shew that general words are to be given their common meaning unless there is something reasonably plain on the face of the instrument to shew that they are not used with that meaning, and the mere fact that general words follow specific words is not enough. But, even if the general words were to be given a restricted meaning, looking at the evident purpose of the whole section—the prevention of fires—and the powers given by the various sub-sections to enable councils to pass by-laws to that end, the sense in which the word "combustible" and the word "dangerous" are used, is that of liability to cause or spread fire. It was argued in support of the other objection to the by-law that, inasmuch as the Parliament of Canada, by the Petroleum Inspection Act, 62 & 63 Vict. ch. 27, has legislated on the subject of the storing of petroleum and naphtha, the Provincial legislation, in so far as it deals with the same subject, is superseded by the Dominion legislation. The Dominion Acts and the regulations made thereunder do not supersede the Provincial legislation or any by-laws passed under the authority of that legislation. The Provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a merely local character for the prevention of fires and the destruction of property by fire, and (*Hodge v. The Queen*, 9 App. Cas. at p. 131) as such cannot be said to interfere with the general regulation of trade and commerce, and does not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naphtha which are in force under the authority of that Act. Rule nisi is discharged with costs.

Hearst & McKay, Sault Ste. Marie, solicitors for prosecutor.

Maclaren, Macdonald, Shepley, & Middleton, Toronto, solicitors for defendant.

MAY 14TH, 1902.

DIVISIONAL COURT.

REX v. BENNETT.

Costs—Conviction—Quashing of—Jurisdiction in High Court to Give Costs in Criminal Matters—Judicature Act has no Application to Criminal Matters—Protection to Magistrate—Sec. 891, Criminal Code.

Motion to quash a conviction of defendant by a justice of the peace for the district of Algoma. It was conceded by counsel for the prosecutor and magistrate that the conviction must be quashed. The defendant asked for costs against both. The magistrate asked for an order for his protection under sec. 891 of the Criminal Code.

W. M. Douglas, K.C., for defendant.

F. Denton, K.C., for prosecutor.

W. E. Middleton, for magistrate.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—We are of opinion that this being a proceeding in a criminal matter the Court has no jurisdiction to give costs against the prosecutor or against the magistrate.

The question as to costs must be determined apart from the provisions of the Judicature Act, which have no application to the practice or procedure in criminal matters (sec. 191), as indeed they could not, because the power to legislate on that subject is by the British North America Act, 1867, assigned exclusively to the Parliament of Canada.

The practice and procedure in all criminal causes and matters in the High Court, as was pointed out by the present Chief Justice of Ontario, in *Regina v. Beemer*, 15 O.R. at p. 270, are to be the same as the practice and procedure in similar causes and matters before the establishment of the High Court: 46 Vict. ch. 10, sec. 2, now sec. 754 of the Criminal Code, 1892.

What that practice was is pointed out in *Regina v. Parlbby*, [1889] W. N. 190, 6 Times L. R. 36, 53 J. P. 774, which shews that the Court has no inherent jurisdiction to award costs against the prosecutor on the making of a rule absolute to remove a conviction by *certiorari* or a rule absolute to quash a conviction so removed, and that the Court had no statutory authority conferred upon it to do so.

This view has been recognized in numerous cases as correct, and has been acted upon by the Court of Appeal: *London County Council v. Churchwardens and Overseers of West Ham* (2), [1892] 2 Q.B. 173; *In re Fisher*, [1894] 1

Ch. 53, 450 ; *The Queen v. Justices, etc.*, [1894] 1 Q.B. 453 ; *The Queen v. Jones*, [1894] 2 Q.B. 382 ; see also *The Queen v. Lee*, 9 Q.B.D. at p. 396, per Field, J.

Two cases are reported in which the English High Court, after the passing of the Judicature Act, gave costs, in one of them against the respondents on making absolute a rule nisi to quash in part an order of the Quarter Sessions : *Regina v. Goodall*, L.R., 9 Q.B. 557 ; and the other against the magistrate : *Regina v. Meyer*, 1 Q.B.D. 175 ; but both of these cases were before the decision in *In re Mills*, 34 Ch. D. 24, by which it was settled, contrary to what had been thought by some Judges, that the Judicature Act had not conferred on the High Court any new jurisdiction as to costs.

Regina v. Parlby, according to the report of it in 22 Q.B.D. 520, at p. 528, would seem to be another case of the same class, but the statement made there that the rule was made absolute with costs is erroneous. The subsequent reports of the case, which have been mentioned, shew that the question of costs was not dealt with when the decision of the Court there reported was given, but was subsequently argued, when costs were refused on the ground stated in the subsequent reports.

In this Province costs have been awarded against the prosecutor in several cases. Most of them were decided before *In re Mills*, and in some of them the conviction or order quashed was for a penalty imposed by or under the authority of Provincial legislation, to which different considerations apply, at all events since the passing of the Law Courts, 1896, 59 Vict. ch. 18, sec. 2, sched. (35), by which the provision, which up to that time was contained in the Judicature Acts, by which proceedings on the Crown or Revenue side of the Queen's Bench and Common Pleas Divisions were excluded from the operation of those Acts, was repealed.

If the question to be determined were one of practice only, we should not feel justified in disturbing any settled practice that had been shewn to exist, but, as it is not of that character, but, as I have said, one as to the jurisdiction of the Court, and being of opinion that the Court has no jurisdiction to award costs in a criminal matter against the prosecutor, we are bound to disregard that practice and to give effect to that opinion.

Cases in which costs have been given against an unsuccessful applicant for a writ of certiorari or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give

costs as a punishment for erroneously putting the jurisdiction of the Court in motion.

The conviction will therefore be quashed without costs, and there will be no order for the protection of the magistrate.

McFadden & McFadden, Sault Ste. Marie, solicitors for magistrate.

Denton, Dunn, & Boulton, Toronto, solicitors for prosecutor.

Hearst & McKay, Sault Ste. Marie, solicitors for defendant.

MAY 13TH, 1902.

DIVISIONAL COURT.

MINNS v. VILLAGE OF OMEMEE.

Municipal Corporation—Way—Non-repair—Opening in Street—Accident to Foot Passenger—Liability of Municipal Corporation—Nonfeasance—Trap-door—Want of Guard—Limitation of Actions.

Appeal by plaintiffs from judgment of BOYD, C., 2 O. L. R. 579.

The plaintiffs are husband and wife. The defendant Graham is a hotelkeeper in the village of Omemee. The plaintiffs allege that the corporation permitted and allowed defendant Graham to make, keep, and maintain an opening or hole in the sidewalk, on George street, adjoining his hotel, for the purpose of an outside opening into its cellar, and that defendants did keep and maintain the opening, and left a loose plank beside it, and did not guard the opening in any way or place a light at it. On the 14th September, 1900, at 8 p.m., the plaintiff Margaret Ellen Minns struck her foot against the plank, and fell forward into the opening, and was injured.

G. H. Watson, K.C., for plaintiffs.

F. D. Moore, Lindsay, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—The question for decision is, whether the limitation provision of sec. 606 of the Municipal Act, requiring that actions for damages for which a municipality is responsible, for its default in keeping its roads, streets, bridges, and highways in repair, to be brought within three months after the damages have been sustained, is applicable to the appellants' claim, and therefore a bar to their action, assuming the respondents' liability for the damages sustained to have been made out. The Chancellor was of opinion that

the provision was applicable, the liability being for non-feasance. I think that the view of the Chancellor was right. But, at all events, assuming that, in the absence of a statutory provision limiting its liability, a municipality which gives, under the authority of a statute, such a permission as was in this case given to defendant Graham, is answerable for the negligence of its licensee, it is clear, looking at all the provisions of the Municipal Act having a bearing thereon, that the Legislature did not intend that a municipality giving the permission which by sec. 639 it is empowered to give, should be under any liability for the acts or omissions of its licensee, except in so far as liability is declared or created by sec. 606, and, if that be so, it follows that the action not having been brought within three months, the claim is barred. Appeal dismissed with costs.

Stewart & O'Connor, Lindsay, solicitors for plaintiffs.

Moore & Jackson, Lindsay, solicitors for defendant corporation.

Stratten & Hall, Peterborough, solicitors for defendant Graham.

FALCONBRIDGE, C.J.

MAY 12TH, 1902.

TRIAL.

DEFERING v. BEATTY.

Partnership—Liability of Partner—Holding Out—Contract—Construction—Interest—Account Stated.

Action for an account by a Chicago firm of dealers in harvesting machinery against their selling agents at Orangeville.

J. N. Fish, Orangeville, for plaintiffs.

A. A. Hughson, Orangeville, and George Robb, Orangeville, for defendants.

FALCONBRIDGE, C.J.—I find : (1) As to the constitution of the firm of Beatty & Co., that Annie Beatty was the sole member thereof ; that every precaution was taken to give publicity to the fact by way of registration and otherwise : that Robert Beatty had made an assignment for the benefit of creditors before the transactions took place : that all the formal documents and papers were signed by him "Beatty & Co., per R.B.," or "by R.B.," or "p.p.R.B.," that there had been a power of attorney from Annie Beatty to her husband, but plaintiffs were not satisfied with this, and had a new one prepared and executed on a form of their own : that against all these things there is only verbal evidence of "holding out," which is denied by defendants, and which is not sufficient to fasten Robert Beatty with liability during

the period in question. (2) As to the question of interest, I find in favour of plaintiffs, both as to the reformation of the contract suggested by defendant and as to the construction thereof; the increased price was not to be in lieu of interest. (3) No sufficient grounds have been shewn for disturbing the accounts stated. I direct a reference to the Master at Orangeville upon the basis of these findings. Further directions and all questions of costs are reserved before me; and upon further directions either party may shew by affidavit or *viva voce* what efforts have been made to strike a balance without going before the Master. If the parties should intimate that they can themselves adjust the account and that the case will go no further, probably I shall not give costs. Stay for 30 days.

Walsh & Fish, Orangeville, solicitors for plaintiffs.

George Robb, Orangeville, solicitor for defendants.

STREET, J.

MAY 15TH, 1902.

TRIAL.

DAWDY v. HAMILTON, GRIMSBY, AND BEAMSVILLE
ELECTRIC R. W. CO.

Street Railway—Accident to Passenger—Conductor Attempting to Pull Passenger on Moving Car—Scope of Authority of Conductor.

Coll v. Toronto R. W. Co., 25 A. R. 55, followed.

Action for negligence, tried with a jury at Welland. The plaintiff's story was that she was standing on the platform of defendants' station, signalling with her hand to one of their cars which was coming on at a rapid rate and into which she wished to get. As the car passed her, her hand was seized by the conductor of the car, and she was lifted from the platform and carried bodily some ten feet, when the conductor let go, and she landed on her feet; that during this period she was struck on the breast by the handle bar and injured. She said she did not attempt and did not intend to get upon the car until it stopped. The defendants called no witnesses, and the jury found that the injury to plaintiff was caused by the conductor seizing her by the hand, causing her to strike on the end of the car; that he was trying to pull her on the car; that he acted negligently in doing so; and they assessed the damages at \$650. At the trial the defendants' motion for a nonsuit was refused, and the questions for the jury were submitted to counsel before being put. No objection was taken to the form of the questions, and no other questions were suggested.

W. M. German, K.C., and G. H. Pettit, Welland, for plaintiff.

E. E. A. DuVernet and L. C. Raymond, Welland, for defendants.

STREET, J., held that in endeavouring to pull on board a car a person who was merely standing on the platform and not attempting to get on board, the conductor was not acting within the scope of his duty as a servant of the company: *Coll v. Toronto R. W. Co.*, 25 A. R. 55; and cases there cited. Action dismissed with costs.

German & Pettit, Welland, solicitors for plaintiff.

DuVernet & Jones, Toronto, solicitors for defendants.

MAY 15TH, 1902.

DIVISIONAL COURT.

REX v. ST. PIERRE.

Municipal Corporation—By-law—Transient Traders—Trader Living at Hotel and Taking Orders for Clothing to be Made of Sample Shewn—Not within Transient Trader Clauses of Municipal Act—Conviction—Statute Taking Away Right to Certiorari.

Motion by defendant to make absolute a rule *nisi* quashing a conviction of defendant by the police magistrate for the city of Ottawa, for offering goods for sale contrary to a transient traders' by-law of the city of Ottawa.

E. E. A. DuVernet, for defendant, contended that the sales were not at Ottawa; that the defendant was in the same position as any other commercial traveller; and was not a transient trader.

A. B. Aylesworth, K.C., for prosecutor, contended that the defendant was properly convicted; that the question as to where the sales took place was one for the magistrate; and, at all events, that the *certiorari* should not have been granted, the Act 2 Edw. VII. ch. 12, sec. 14, having taken away the right to *certiorari*.

DuVernet, in reply, contended that *certiorari* will be granted for want of jurisdiction, notwithstanding such enactment: and that there is want of jurisdiction when the evidence does not disclose an offence within the statute.

The judgment of the Court (BOYD, C., MEREDITH, C.J.) was delivered by

BOYD, C.—There being no statutory provision as regards transient traders, similar to that as regards hawkers, that the description is to include those who carry or expose samples or patterns of goods to be delivered afterwards, the defendant does not come under the category of transient traders. No goods were offered for sale. Samples of goods were exhibited suitable for clothing, and the transaction was carried out by the choice of some particular pattern in Ottawa, notification of which was sent to Montreal, whereupon the garment was made out of that material, and forwarded to the person giving the order at Ottawa, who then made payment on delivery. The collocation of the words in the

statute as to sale or offering for sale by transient traders implies some exhibition and visible presentation of the goods dealt in, such as occurs in sales by auction, the whole trading being carried on by the occupant of fixed premises within the municipality. Neither in terms nor in substance was there an offering of goods for sale within the municipality. Nevertheless, the effect of this method of dealing may be to affect prejudicially the business of tax-paying tailors and clothiers of Ottawa.

According to the cases, *certiorari* lies if the magistrate has no jurisdiction over the matter adjudicated. That is, there was no power to pass a by-law, or to convict, under the transient traders' clauses in the Municipal Act, in respect to a person living at a hotel and taking orders for clothing to be made out of material corresponding with samples exhibited.

Rule absolute quashing conviction without costs.

MACMAHON, J.

MAY 13TH, 1902.

TRIAL.

PARENT v. COOK.

Conversion—Trespass—Cutting and Removing Trees—Damages.

Action for damages for breaking and entering lot 2 in the 12th concession of the township of Colchester, containing 107 acres, and cutting down and removing therefrom timber and wood, and also for carrying away felled timber and wood and committing other waste and damage.

J. W. Hanna, Windsor, for plaintiff.

J. H. Rodd, Windsor, for defendants.

MACMAHON, J., after reviewing the evidence, held that the plaintiff had not sustained any damage, and dismissed the action with costs.

MAY 12TH, 1902.

C. A.

GUNN v. HARPER.

Judgment—Death of Plaintiff After Argument and Before Judgment—Certificate of Judgment May be Amended and Dated the Day the Argument Terminated.

Motion by defendants *ex parte* to vary the certificate of the judgment of this Court by changing the date from that of the pronouncing of judgment to that of the argument, the plaintiff having died between argument and judgment. In ignorance of his death, the defendants applied for and obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced.

T. D. Delamere, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, and Moss, J.J.A.) was delivered by

Moss, J.A., who, after referring to *Turner v. London and South Western R.W.Co.*, L.R. 17 Eq. 561, *Collinson v. Lister*, 20 Beav. 355, *Troup v. Troup*, 16 W. R. 573, and *Ecroyd v. Counthard*, [1897] 2 Ch. 554, said:—These cases shew that where at the time of giving judgment the Court is aware that an abatement has occurred since the argument, it may direct the judgment to be dated as of the day when the argument terminated. Rule 629 provides that every judgment and order pronounced by the Court or a Judge shall be dated as of the day on which it is pronounced, and shall take effect from that date, unless otherwise directed. In the present case, if the Court had been aware of the death of the plaintiff when giving judgment, it would have pronounced it and directed it to be entered as of the day of the argument, and it would then have borne that date, and have been so entered. The certificate of this Court having issued in its present form through ignorance of an existing fact, the Court, in the exercise of its inherent power over its records, may now give the proper directions with regard to its form: *Re Swire*, 30 Ch. D. 239; *Sherk v. Evans*, 22 A.R. 242; *Rattray v. Young*, Cass.Sup.Ct. Dig. 692. And the proper course is to amend it by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. Direction accordingly. No costs of application or amendment.

J. L. Whiting, Kingston, solicitor for defendants.

ROBERTSON, J.

MAY 12TH, 1902.

TRIAL.

HOLMES v. TOWN OF GODERICH.

Municipal Corporation—"Ordinary Current Expenditure"—By law to Raise Money for—Right of Corporation to Use Portion of Such Money as Security on Appeal by it to Supreme Court.

Action to restrain defendants from discounting or in any way dealing with a promissory note for \$2,000, made for the purpose of providing funds for security for appeal to Supreme Court of Canada in a former action of *Holmes v. Town of Goderich*, and for delivery up of note for cancellation. The note in question was signed by the mayor and treasurer of the town and sealed with the seal of the town corporation. The council of the town had previously passed by-laws authorizing the mayor and treasurer to borrow \$22,000 from the Bank of Montreal for current expenditure of the corporation. These by-laws were acted upon, and from time to time money was drawn from the bank as re-

quired for current expenditure, notes being delivered to the bank for such sums as were required. At the time the note in question was given, \$5,000 of the \$22,000 remained to be borrowed.

W. Proudfoot, Goderich, for plaintiff.

J. T. Garrow, K.C., for defendants.

ROBERTSON, J.—It is contended by the defendants that the by-laws authorizing the borrowing of the sum of \$22,000 are still in force; and, therefore, whatever sum or sums may have been lent by the defendant bank under the authority therefor, not exceeding that sum, must be assumed for the present as being justified.

On the other hand, the plaintiff contends that the amount thus authorized to be borrowed, exceeded the sum which, under sec. 435 of the Municipal Act, the council had authority to borrow; and the by-laws, therefore, are *ultra vires*, because \$22,000 was in excess of 80 per cent. of the amount collected as taxes, to pay "the ordinary current expenditure" of the municipality in the preceding year.

The total amount collected, of all taxes, for 1900 at the time of the passing of the by-laws, was \$28,154.68; of this sum, 80 per cent. would be more than the amount authorized to be borrowed by \$5,630.93, if the plaintiff's contention is correct.

The question then is, what is the meaning of the words, "ordinary current expenditure"? After much consideration I have come to the conclusion that the whole sum of the estimates for 1900, viz., \$30,084.12, as shewn in the 4th paragraph of the admissions, as follows: for public schools, \$5,000; for separate schools, \$450; for collegiate institutes, \$2,800; for county rate, \$984.70; for consolidated debenture debt, \$3,755.48; and for all other purposes, \$17,093.94: was the sum levied to be collected for that purpose; but, as the whole amount was not collected up to the time of the passing of the by-laws, the percentage for borrowing was calculated on the latter sum, \$28,154.68. * * * To say that the sums required for public school purposes or for separate schools or for collegiate institutes or for county rates or for consolidated debenture debts, are not all within the "ordinary current expenditure" of the municipality, is something I cannot understand. "Expenditure" of the character indicated appertains to every municipality. Such "expenditure" includes all sums which are not to be applied in payment of liabilities exceptional in character and are not recurring year by year. *Scott v. Peterborough*, 19 U. C. R. 469, *McMaster v. Newmarket*, 11 C. P. 398, *Wallace v. Orangeville*, 5 O. R. 37, *Re Olver and Ottawa*, 20 A. R. 529, do not declare what constitutes "ordinary current expenditure." * * * It appears to me that a little practical

common sense, and common knowledge, must be applied in disposing of this question. In the first place, it may be asked why the council of any municipality was authorized to borrow money at all. One and all have the power to assess and levy on the whole taxable property within its jurisdiction, a sufficient sum in each year to pay all its valid debts, whether principal or interest, falling due within the year, etc. The work of the assessor is the first thing done; the assessment rates being returned and the assessed value ascertained, as provided; the next thing in order is to ascertain the amount required for all purposes during that year; and a rate not to exceed two cents on the dollar on the whole assessed value, is to be struck for all purposes, except school rates. Then the collector goes to work. Now the accomplishment of all these things requires time; it is generally as late as October, and sometimes later, before the taxes are collected; but in the meantime the liabilities are accruing due from month to month. The salaries of officials have to be paid; the schools require funds to meet teachers' salaries and other expenses connected with the schools; debentures are becoming due, and interest thereon; but there is nothing in the treasury to meet these several demands. This being the case, the Legislature allowed and gave power to the council of each municipality to pass by-laws authorizing the borrowing of what was necessary to meet those several demands in anticipation of the taxes levied and being collected. How can it be said that these several sums thus falling due from time to time each year, as shewn by the estimates of each year, and the money to meet them when paid, is not "current expenditure"? There is nothing to shew that there is a "debenture sinking fund" in this case, which, of course, would not be included in "current expenditure." That fund, if any, is one created by putting by a certain sum each year, levied for the purpose of meeting debentures yet to fall due. It was stated at the Bar that the consolidated debt debentures, referred to in the estimates, were payable by annual instalments, and the amount of each instalment was levied each year, etc., and there was, therefore, no "sinking fund."

I have, therefore, come to the conclusion that the amount authorized to be borrowed by the by-law No. 4 of 1901, as amended by by-law No. 4 (B) of 1901, authorizing the amount of \$22,000 to be borrowed, was not, nor is it, *ultra vires* of the council of the defendant corporation. And, on the whole case, I am of the opinion that the action must be dismissed, and the injunction dissolved, with full costs, together with the costs of the motion to extend the injunction and all costs incident thereto.

Dudley Holmes, Goderich, solicitor for plaintiff.

Garrow & Garrow, Goderich, solicitors for defendants.

MAY 16TH, 1902.

DIVISIONAL COURT.

CLARK v. GRAY.

Fraud and Misrepresentation—Sale of Shares—Action for Deceit—Sole or Material Cause of Purchase.

Motion by plaintiff to set aside nonsuit entered by LOUNT, J., at the trial at Woodstock, of an action for damages for deceit, inducing the plaintiff to purchase from defendant a block of shares in the Bear Creek Mining Co. of British Columbia.

The motion was heard by BOYD, C., and MEREDITH, C.J.

A. B. Aylesworth, K.C., for plaintiff.

G. H. Watson, K.C. for defendant.

MEREDITH, C.J.:—In order to entitle the defendant to have his case submitted to the jury, it was incumbent on him to give evidence that the representations upon which he relied were in fact made; that they were false in fact; that the defendant knew them to be false, or made them recklessly, not caring whether they were true or false; and that the representations were the sole cause of the plaintiff's act of purchasing the shares, or materially contributed to his purchasing them. As to all of the alleged representations, except that as to the \$40,000 stated to have been in the treasury for the purpose of developing the mine, there was no reasonable evidence that they were false to the knowledge of the defendant, or that they were made by him recklessly, not caring whether they were true or false. The plaintiff knew that the information which the defendant communicated to him was the result of what had been reported to him from British Columbia as to the property; and the circumstance that, after discovering the true state of matters, the plaintiff attributed blame for the false statement to Best, from whom the defendant derived his information, and not to the defendant, is an important circumstance to be considered in dealing with this branch. As to the representation as to the \$40,000, the testimony of the plaintiff was somewhat vague and unsatisfactory, but, assuming that it was shewn to have been made as charged by plaintiff, his case fails for lack of any evidence that the representation caused or materially contributed to his act of purchasing the shares. Nothing can be found in the plaintiff's testimony in the nature of a statement of that effect. He did testify that he relied on the defendant's representations as to the property; but that means as to the mining property, its character, richness, etc., and not as to the financial position of the company or the extent to which it had succeeded in disposing of its shares. Motion dismissed with costs, without prejudice to any action that the

plaintiff may be advised to bring for the rescission of the contract to purchase the shares; or the plaintiff may have the option of a new trial confined to the representation as to the \$40,000, on payment of the costs of the last trial and of this motion.

BOYD, C.:—The only matter to be considered is as to the \$40,000 representation. This was not complained of till a late stage, and then by amended pleading. The representation as pleaded is not as proved, but materially varies therefrom. The evidence as to what was represented is not distinct and clear cut, such as would be expected in order to establish fraud and deceit, and altogether I am not disposed to differ from the conclusion of my brother Meredith.

J. S. Mackay, Woodstock, solicitor for plaintiff.

Smith & Mahon, Woodstock, solicitors for defendants.

MACMAHON, J.

MAY 12TH, 1902.

CHAMBERS.

REX EX REL. IVISON v. IRWIN.

Municipal Election—Tampering with Ballots—Evidence of Voters as to how they Cast their Ballots not Admissible—Evidence Viva Voce Supplementary to Affidavit Evidence Admissible—Discretion to Refuse Leave to Cross-Examine Affiants—Irregularities.

Appeal by respondent from the judgment of the senior Judge of the County Court of Essex, declaring void and setting aside the election of the relator as a councillor of the town of Leamington.

A. B. Aylesworth, K.C., for the respondent.

J. H. Rodd, Windsor, for the relator.

MACMAHON, J.—There were ten candidates for the office of councillor for the town of Leamington, of whom only six could be elected. The respondent was elected by a majority of 101 votes over Mr. Coultice, the minority candidate who polled the vote next in number to the respondent, the vote being :

Irwin..... 300

Coultice..... 199

Majority for Irwin.... 101

Out of 142 ballots cast at poll No. 3, 132 were found to be marked for the respondent, while 29 voters by their affidavits and 3 others who gave *viva voce* evidence—in all, 32 voters,—swear that they did not vote for him; there is the strongest possible evidence that in some way access was had to the ballot box and the ballot papers tampered with.

With regard to the objection of the improper reception by the County Court Judge of *viva voce* evidence on behalf

of the relator, it was contended that he was precluded from supplementing his affidavit evidence by calling witnesses to give *viva voce* evidence, although their names were mentioned in the notice of motion. The question raised was disposed of adversely to the respondent's contention, in *Regina ex rel. Mangan v. Fleming*, 14 P. R. 458. . . . It appears that, although objection was raised to the evidence, some of the voters were called as witnesses by the relator, and stated for whom they voted. . . .

Section 200 of the Municipal Act, R. S. O. ch. 223, provides that "no person who has voted at an election shall in any legal proceeding to question the election or return be required to state for whom he voted." Section 7 of the Dominion Elections Act, and sec. 158 of the Ontario Elections Act, R. S. O. ch. 9, are in like terms. See *Re Haldimand Election*, 1 E. C. at p. 574; *Re Lincoln Election*, 4 A. R. at p. 210.

The improper reception of the evidence to which I have referred, cannot, however, affect the judgment appealed against, as without such evidence there was the evidence of the 32 voters, to which credence was given by the learned County Court Judge, which, together with the scrutiny made by him of the ballots, afforded, as he considered, ample evidence that the ballots had been tampered with after the ballot papers had been deposited in the ballot box at the close of the poll.

At the examination counsel for the respondent asked for leave to cross-examine the several affiants who had made the affidavits filed by the relator. The learned Judge of the County Court refused, and his refusal is one of the grounds of appeal. In *Regina ex rel. Piddington v. Riddell*, 4 P. R. 80, *Morrison, J.* held that ordering the oral examination of the parties for the purpose of impeaching the facts sworn to by one Clinkenboomer and the respondent was discretionary with him, and refused the application. And in *Rex ex rel. Ross v. Taylor*, 22 C. L. T. Occ. N. 183, the Master in Chambers followed *Piddington v. Riddell*, holding that it was a matter of discretion as to permitting a cross-examination of persons who had made affidavits filed by the respondents in answer to the affidavits filed by the relator. There is no doubt that in the present case it was discretionary with the learned County Court Judge, after the examination had commenced, to refuse leave to cross-examine.

As the practice in the High Court is applicable to quo warranto proceedings (*Rex ex rel. Roberts v. Ponsford*, 22 C. L. T. Occ. N. 146, ante 223), the respondent could before the examination have cross-examined all persons who had made the affidavits filed by the relator.

It was contended by the respondent that the election was saved by sec. 204 of the Act.

Although the deputy returning officer said that when taking the ballot box from the poll to the office of the town clerk, he only called at his own house for a few moments, his taking the ballot box there was violating a very stringent provision of the Act, for which, on conviction, he would be liable to imprisonment for 6 months and to a fine of \$400; this, together with the finding by the County Court Judge that a large number of the ballots had been tampered with after the ballot papers had been placed in the ballot box, renders it impossible to say that such irregularities did not affect the result of the election.

The appeal must be dismissed with costs.

Fleming, Wigle, & Rodd, Windsor, solicitors for relator.

J. W. Hanna, Windsor, solicitor for respondent.

MAY 17TH, 1902.

DIVISIONAL COURT.

O'HEARN v. TOWN OF PORT ARTHUR.

Street Railways—Negligence—Operation of Car—Collision—Contributory Negligence—Duty of Driver of Vehicle—Proximate Cause—Nonsuit.

Appeal by defendants from judgment of BRITTON, J., entered upon the findings of the jury in an action by plaintiff, a teamster in the town of Port Arthur, for damages for bodily injuries caused by being run into by a street car of defendants, owing to alleged negligent running at a rapid and dangerous speed.

The plaintiff, at 4 p.m., was driving northward along the west side of Cumberland street, on which the track is, and was crossing it to go along Ambrose street, which runs into Cumberland street at right angles, when the collision took place.

The following questions were submitted to the jury:

1. Were the defendants guilty of negligence in running their car on the occasion of the accident at too great speed?
2. Were the defendants guilty of negligence in not so running their car as to be able to control it or stop it in time to prevent a collision with the plaintiff, who was seen by the motorman, and who, for all the motorman knew, might turn down as he did actually turn down Ambrose street?
3. Was the gong sounded by the motorman as the car approached the plaintiff on Cumberland street?
4. Could the plaintiff by the exercise of ordinary care have avoided the collision?
5. What damages has plaintiff sustained?

The jury found that the speed of the car on the occasion of the accident was excessive; that the motorman was negligent in not sounding the gong; and that the plaintiff could not have avoided the accident, nor be justly accused of ordinary negligence; and assessed the damages at \$200.

N. W. Rowell, for defendants.

J. H. Moss, for plaintiff.

THE COURT (BOYD, C., MEREDITH, J.) held that the case was not distinguishable from *Danger v. London Street R. W. Co.*, 30 O. R. 493.

BOYD, C.—When vehicles are moving ahead of the cars and in the same direction, it is reasonable to hold that the drivers of the vehicles, who know when and where they are going to turn and cross the track, should be vigilant to see that no car is coming behind them. A greater burden in this regard should rest on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension that some one or everyone ahead may cross in front of the moving car at any moment. The driver can move in any direction, not so the motorman. The right of way being with the car, the driver should keep out of its track, unless upon observation he is satisfied that the passage is clear.

MEREDITH, J.—It would have been better if the usual questions had been submitted to the jury. Little is ever gained by departing from well settled forms; often a good deal is lost. In this case there is no direct finding that the negligence which the jury attributed to the defendants was the proximate cause of the plaintiff's injury; the usual question was not asked. Nor was the question whether, assuming the plaintiff to have by negligence contributed to the accident, might the defendants yet have by the exercise of ordinary care avoided the injury. This subject seems to have been dealt with, during the charge, by withdrawing it from the jury, on the ground that it was plain that the injury could not have been so avoided. This was done in the plaintiff's interests, it being said that the defendants conceded it. It seems to have been overlooked at the moment that it might also, in another view of the case, the one now being dealt with, aid the plaintiff, and no assent on his part is mentioned. Both parties are perhaps now precluded from urging that the injury might have been so avoided; still it would have been more satisfactory to have had the usual answers.

And, if the case should have gone to the jury at all, it would have been better if the jury had been charged at least somewhat in accordance with the law as expounded in the case of *Danger v. London Street R. W. Co.*, 30 O. R. 493.

That is a case which was binding upon the trial Judge, and is under the statute binding upon us. It was the latest

case upon the same questions, and, in its facts, most like this case, and is judgment of a Divisional Court.

But the main question is whether the plaintiff ought to have been nonsuited, on the ground of contributory negligence.

He should have been if the Danger case was well decided, and, whether it was or not, it was binding, as I have said, and so there should have been a nonsuit. I am quite unable to distinguish this case from that. The few minor differences of fact seem to me to make this case rather stronger than that was, against the plaintiff. In that case, the plaintiff was driving in a covered buggy, under very considerable difficulty of hearing and seeing anything behind him; in this case the plaintiff was driving on the top of an open coal cart, with no obstruction to his view in any direction, and had but to turn his head to know whether his way was safe or dangerous. In that case the plaintiff had looked back and had seen an approaching car, but so far away—many hundreds of feet—that he thought he could cross before it overtook him, but he did not look when he ought to have looked, just before attempting to cross; in this case the plaintiff looked back several hundreds of feet, and again about one hundred feet, before attempting to cross; but by reason of a turn in the road he could not see an approaching car unless within 800 feet from him at the furthest; beyond that he could know nothing by sight; within it he might fail to observe. In the Danger case the track was a straight line as far as the eye could see; and in that case the plaintiff's attention was distracted by another car approaching in the opposite direction. In this case, the whole line and the whole public street were clear, except for the plaintiff's cart and the car into which he turned; and all there was to distract his attention was some children riding by his leave at the tail of his cart.

I understand the Danger case to decide this, that, under ordinary circumstances, any one attempting to cross an electric street railway, with a knowledge of the constant running of cars upon it, such as is usual in cities and towns, without looking, is negligent. I entirely concur in that view of everyone's duty to himself, and to all whom he may endanger by want of that ordinary care. No reasonable man could, in my judgment, say that, on the facts of this case, there was not great negligence in attempting to cross without looking. Looking meant a mere turn of the head; the man was not going on in the same course; he was on the wrong side of the road in regard to passing other vehicles, and he was about to turn at right angles to his course and immediately upon the car track. This he knew; the change was the result of his own thought, and his own action. He

knew that he was passing from a place of safety into a place of general danger; he intended to do that, and did it; but did it without taking the trouble—if trouble it can be called—to turn his head and know if he safely might. His one excuse seems to me to condemn rather than to acquit him, if it really have any effect upon the question at all. He looked, at about 400 feet and again at about 100 feet, before attempting to cross. If it was right to look at 400 or 100 feet away, how much more so just before going upon dangerous ground. The noise of his cart—the excuse for not hearing—made it more imperative to look at the proper place and time. When he looked first about 400 feet away, a car would be out of sight at about 400 feet off; when he last looked at about 100 it would be out of sight; at each or either time it might be in sight and he have failed to observe it. I cannot imagine any ordinarily careful person acting as the plaintiff says he did just before turning upon the track. His position on the left hand side of the road would indicate that he was going to stop at some place on that side or to turn to the left at one of the cross streets, if it indicated anything. Some measure of care is required of a driver ahead; if his stopping or turning one way or other will interfere with traffic behind him, he should indicate his intention in time by raising his whip or arm or in some other recognized or sufficient manner.

Then the one question is: Was the plaintiff upon his shewing guilty of negligence? That his act at least contributed to the injury is unquestioned, and unquestionable. Without it he could not have been injured.

All the facts are admitted; for the purposes of the motion for nonsuit the plaintiff's statement of them is accepted; no other evidence strengthens it upon this question. There is no disputed question of fact for the jury; no inference of fact to be drawn. All that has to be considered is, did his admitted act constitute negligence?

Is that a question for the Court or for the jury? Unhesitatingly I would say for the Court in the first place to say whether it afforded any reasonable evidence to go to the jury. It is for the Court to say whether there is any reasonable evidence upon which a jury could find, and it is only after that question is answered in the affirmative that it is for the jury to say what the finding should be.

Upon any given state of facts it is for the Judge to say whether negligence can rightly be inferred, and for the jury to say whether it ought to be inferred: *Jackson v. Metropolitan R. W. Co.*, 3 App. Cas. 193.

Appeal allowed and action dismissed with costs on lower scale.

F. H. Keefer, Port Arthur, solicitor for plaintiff.

W. F. Langworthy, Port Arthur, solicitor for defendants.

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ONTARIO WEEKLY REPORTER.

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NO. 20.

MAY 16TH, 1902.

C. A.

CANADA ATLANTIC R. W. CO. v. CITY OF OTTAWA.

Railways—Right to Cross Streets—Permission of Railway Committee of Privy Council—Necessity for Expropriation Proceedings.

An appeal by the defendants from the judgment of BOYD, C., 2 O. L. R. 336.

A. B. Aylesworth, K.C., and Taylor McVeity, Ottawa, for appellants.

F. H. Chrysler, K.C., for plaintiffs.

THE COURT (OSLER, MACLENNAN, MOSS, J.J.A.) dismissed the appeal with costs, following their recent decision in *Montreal and Ottawa R. W. Co. v. City of Ottawa*, ante 349.

Taylor McVeity, solicitor for appellants.

Chrysler & Bethune, Ottawa, solicitors for respondents.

MACLENNAN, J.A.

MAY 16TH, 1902.

C. A.—CHAMBERS.

CENTAUR CYCLE CO v. HILL.

Execution—Leave to Issue Notwithstanding Appeal—Special Circumstances—Rule 827 (2).

Motion by plaintiffs for leave to issue execution upon the judgment of BOYD, C., ante p. 229, notwithstanding the

pendency of the appeal. The defendant Love had paid into Court, \$200 as security for the costs of the appeal.

W. E. Middleton, for plaintiffs.

C. W. Kerr, for defendant Hill.

W. E. Raney, for defendant Love.

MACLENNAN, J.A., held, after some hesitation, and with some reluctance, that the plaintiffs were entitled to leave to issue execution. They had a judgment for \$2,500 for goods, of which the defendants had received the benefit. They were dealing with the defendants on terms of security for their account, and the security had turned out to be wholly illusory. The financial position of defendants was now found to be weak, one of them having given up business for that reason, and the other having been obliged to borrow two considerable sums upon mortgage of his stock in trade to enable him to carry on his business. Under these circumstances, the case was one for the exercise of the power given by Rule 827 (2) of ordering that execution be not stayed pending the appeal. The appellants might, however, have the execution stayed upon giving security, to the satisfaction of a Judge, for the judgment debt and costs. Costs of motion to be costs in the appeal.

ROBERTSON, J.

MAY 15TH, 1902.

CHAMBERS.

McLAUGHLIN v. McLAUGHLIN.

Costs—Partition Proceeding—Taxed Costs—Special Circumstances.

An application by the plaintiffs for an order allowing taxed costs instead of the usual commission in a summary proceeding for partition or sale of land, upon the ground that an unusual amount of time and trouble had necessarily been expended by the plaintiffs' solicitor in the proceedings.

J. G. O'Donoghue, for plaintiffs.

F. W. Harcourt, for infant defendants.

E. J. B. Duncan, for adult defendants.

ROBERTSON, J.—I have carefully considered this matter, and, in my judgment, it is an exceptional case, and the plaintiffs' solicitor should be allowed his costs according to the tariff, instead of commission under Rule 146.

MAY 19TH, 1902.

DIVISIONAL COURT.

Re SNURE AND DAVIS.

Landlord and Tenant—Overholding Tenants Act, R. S. O. ch. 171—Breach of Covenant in Lease—Chattel Mortgage made by Mother of Tenant—"Wrongful" Refusal to Go Out of Possession—"Clearly"—Upon Certiorari, the Court can Look only at the Proceedings and Evidence Below.

Motion by Loyal Davis and Elizabeth Davis to set aside an order made by the Judge of the County Court of Lincoln, on the 18th January last, purporting to be made under the Overholding Tenants Act, adjudging that Jacob E. Snure, the landlord, was entitled to the possession of the lands in question, and permitting a writ of possession to issue to put the landlord in possession as against the applicants, the tenants. The applicants contended that their lease had not expired or been determined at the time these proceedings were taken; that nothing was done by the tenants which entitled the landlord to declare a forfeiture of the lease; that there was a bona fide matter of dispute between the parties, and the Judge should not have determined the matter summarily, but should have dismissed the case and left the landlord to his remedy by an ordinary action at law. The landlord distrained for rent by virtue of an acceleration clause to be enforced if the tenants gave a chattel mortgage. The goods on the demised premises were seized and sold under a chattel mortgage made by the mother of one of the tenants.

G. Kerr, for the tenants.

T. Mulvey, for the landlord.

THE COURT (BOYD, C., MEREDITH., C.J.) held that the order should be set aside.

BOYD, C.—Under the Overholding Tenants Act two things must concur to justify the summary interference of the Judge: (1) the tenant must wrongfully refuse to go out of possession, and (2) it must appear to the Judge that the case is clearly one coming under the purview of the Act. The two adverbs ("wrongfully" and "clearly") seem to be used emphatically, and on a consideration of the evidence and proceedings returned, neither requirement is adequately met by the applicant, the landlord. The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, and no such breach as was relied on has in fact taken place.

MEREDITH, C.J.—It is only the proceedings and evidence before the Judge sent up pursuant to a writ of *certiorari* at which we may look for the purpose of determining

what is to be decided by the Court under sec. 6 of the Overholding Tenants Act, R. S. O. ch. 171. There is nothing in that evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord claimed the right to re-enter. The chattel mortgage, the making of which the landlord relied on as having been a breach of that provision, was not made by Davis, but by his mother, who was a stranger to the lease, and the goods embraced in it were her goods, and not his. There was, therefore, but one gale of rent due, that which was payable according to the terms of the lease on the 1st November, 1901, and that having been satisfied by the distress which was made, the landlord had no right to put an end to the lease and to re-enter. Order set aside with costs here and below to be paid by the landlord, and, if necessary, sheriff to be ordered to restore the tenants to their possession.

J. E. Varley, St. Catharines, solicitor for tenant.

M. J. McCarron, St. Catharines, solicitor for landlord.

BRITTON, J.

MAY 19TH, 1902.

TRIAL.

McRAE v. S. J. WILSON CO.

Contract—Breach—Damages—Time—Essence of—Waiver.

Action for an account and for damages for breach of contract for purchase by defendants of lumber, tried without a jury at Pembroke.

R. C. McNab, Renfrew, and W. Barclay Craig, Renfrew, for plaintiff.

W. R. Riddell, K.C., and W. H. Irving, for defendants.

BRITTON, J., held that plaintiff was not entitled to recover from defendants the loss by the sale to Cameron & Co. Time was not of the essence. There was a waiver of any time originally agreed on; the contract was treated as subsisting on 18th December, 1899, and after that plaintiff sold without notice to defendants. He also held, that upon the account plaintiff should recover \$434, that is, \$84 over and above the amount paid into Court by defendants. Judgment for plaintiff for \$84 and order for payment out of money in Court, with the general costs of the action. The plaintiff to get no costs as to his claim for damages, and to pay defendants' costs, if any, specially incurred on that branch of the case.

MAY 22ND, 1902.

DIVISIONAL COURT.

BATZOLD v. UPPER.

Evidence—Corroboration—R. S. O. ch. 73, sec. 10—Action against Administrator.

Appeal by plaintiff from the judgment of the County Court of Elgin.

Shirley Denison, for plaintiff.

W. A. Wilson, St. Thomas, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The action is brought by the plaintiff, Elizabeth Batzold, a widow, to recover from the defendant, who is the widow and administratrix of one Upper, a sum of \$300 alleged to have been intrusted to Upper in his lifetime for investment for the plaintiff.

The action was tried before Hughes, Co. J., and a jury at St. Thomas. The plaintiff swore that she had handed the money in question to the deceased for investment, telling him that it was money which her husband had directed her to lay aside for the benefit of two of her daughters for their education. The only corroboration to her evidence was the statement of Violet Batzold, one of the two daughters in question, who swore that she had heard her mother counting out \$20 bills to Upper, and had heard Upper say that she would get a larger interest than if she paid it into the bank, and that she could have the money back when she wanted it.

The defendant moved for a nonsuit on the ground that there was no corroboration. The learned Judge left the following questions to the jury:

1. Did Mrs. Batzold pay or hand over any money to Mr. Upper? The answer was, "Yes."

2. How much money, if any? Answer, "\$300."

3. Was it handed to Mr. Upper to invest for her daughters, including Violet Batzold? Answer, "Yes."

The 4th question is of no importance here. The 5th question was: "For what purpose was the money handed to Mr. Upper, if it was not for the benefit of the daughters? Answer, "For no other purpose."

The Judge, having reserved the defendant's motion for a nonsuit, considered that and the plaintiff's motion for

judgment on the findings of the jury together, and gave judgment dismissing the action with costs, upon the ground that Violet Batzold was an interested party, and that her evidence was, therefore, no corroboration of that of the plaintiff, her mother; and further, upon the ground that upon the findings of the jury the plaintiff had no interest in the money after handing it over to Upper to invest for her daughters, who thereafter became entitled to it.

The defendant in her pleadings in this action has merely denied the receipt by the deceased of the money claimed by the plaintiff; she has not set up any *jus tertii*, nor was any suggestion made from beginning to end of the trial that the plaintiff was not entitled to recover the money if the jury found that she had handed it to the deceased. The questions fought out were: 1st. Did the plaintiff hand the money to the deceased? 2nd. If she did, was the witness Violet Batzold interested in it as a cestui que trust? The latter question was considered because of the possible bearing it might have upon the sufficiency of the corroboration of the plaintiff's evidence. The questions submitted to the jury must be read in the light of the evidence and the contentions raised at the trial. The 3rd and 5th questions must, therefore, be construed as intended merely to raise the question whether the daughters were interested in the money as cestuis que trust, and the answers to them as affirming that they were, for there was no evidence that the plaintiff had intended to part with her legal title to the money, and the jury were not asked to consider that question at all, nor was it raised either upon the pleadings or otherwise. We must take it, however, that, in the opinion of the jury, the plaintiff was a trustee of the money for the benefit of her two daughters, of whom Violet Batzold, the witness, was one, and the question is, whether the plaintiff's evidence was sufficiently corroborated as required by the statute by the evidence of Violet Batzold. In point of substance, I think there can be no doubt that the facts sworn to by her were sufficient corroboration. She says she heard her mother counting out money to Upper, and that Upper said "it was all right, she could get it any time she wanted it," and "that she would get a larger interest on the money than if she paid it into the bank." These statements were consistent only with the story told by the plaintiff of the matter, and were entirely inconsistent with the suggested explanation that the plaintiff was merely paying Upper the rent she owed him. The jury were at liberty to refuse to believe them if they thought proper, but they were properly charged that the plaintiff was not entitled to a verdict without corroboration, and they have found in her favour, so it must be assumed that they believed Violet Batzold's story.

The only question remaining to be determined, therefore, is, whether Violet Batzold's evidence for any reason should be held to be insufficient corroboration of that of the plaintiff, because of the fact that she was a cestui que trust of the money in question.

R. S. O. ch. 73, sec. 10, applied to the present case, means that Mrs. Batzold cannot obtain a verdict on her own evidence unless she has been corroborated by some other material evidence. The evidence of Violet Batzold was, in my opinion, material evidence corroborating that of the plaintiff, and there is nothing in the Act which would justify a Judge in declining to submit it to the jury as corroboration. Her interest in the result might well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration.

In my opinion, the appeal must be allowed with costs, and the judgment of the Court below must be set aside, and a verdict entered for the plaintiff for \$300 with interest at five per cent. from 13th August, 1899, and costs.

J. A. Robinson, St. Thomas, solicitor for plaintiff.

McCrimmon & Wuson, St. Thomas, solicitors for defendant.

MAY 22ND, 1902.

DIVISIONAL COURT.

LLOYD v. WALKER.

Assessment and Taxes—"Owner"—Agreement to Purchase from Mortgagee Pending Foreclosure—Possession—Name not on Roll, nor Person Assessed—R. S. O. ch. 224, sec. 135, sub-sec. (1), cl. 3—Lease—Estoppel.

Appeal by defendant from judgment of County Court of York in action brought to restrain defendant, the tax collector for the township of Whitchurch, from selling, under a distress warrant for arrears of taxes upon a certain farm lot in that township, a quantity of building material, cedar posts, etc., found thereon, and admitted to be the property of the plaintiff. One Pegg, the owner of the farm lot, mortgaged it, in 1895, to the Independent Order of Foresters, and in July, 1899, the mortgagees in possession made an agreement to sell to plaintiff, upon certain terms, as soon as they had completed pending foreclosure proceedings. In the meantime, the plaintiff was to have possession, manage

the property, etc., make sales subject to approval of mortgagees, and to render them accounts. Pending the foreclosure proceedings the plaintiff joined with the mortgagees in making a lease of a portion of the lot to one Kerr. The plaintiff was not assessed for the property, and the taxes were not charged against him by name in the collector's roll.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

S. B. Woods, for defendant.

J. J. Warren, for plaintiff.

STREET, J.—In my opinion, it is clear from the provisions of this agreement that the plaintiff's rights as purchaser were not to take effect *in praesenti*, nor until the foreclosure should be completed, and were to be dependent upon the happening of that event. Until that time arrived he was to pay no part of the purchase money, and was to manage the property as the mortgagees' servant during his good behaviour only. No other construction can be placed upon the agreement consistently with the obvious intention of the parties that the mortgagees should proceed to foreclose their mortgage, preparatory to carrying their agreement into effect; for, if the agreement had provided for an immediate acquisition by the now plaintiff Lloyd of the mortgagees' rights, they could not have prosecuted the foreclosure proceedings in their own name. It is only upon the construction, which I think is the proper one, upon the terms of the agreement, that the mortgagees were to remain owners of the mortgage until the completion of the foreclosure, and were then to convey to the plaintiff, that the proceedings for foreclosure can be treated as regular: *Scott v. Benedict*, 9 C. L. T. Occ. N. 181.

As the plaintiff had no estate in the land, and no possession of it save as agent for the mortgagees, and was only to become entitled to an estate in it upon the happening of an uncertain future event, he cannot, in my judgment, be held to be the "owner" of it, upon even the most liberal construction of that word, and the action was, therefore, properly dismissed.

I have not failed to notice that the plaintiff joined with the mortgagees, pending the foreclosure proceedings, in a lease, to one Kerr, of the premises. That circumstance, however, does not seem to affect the question, when the terms of the lease are considered. The lease is expressly made dependent upon the continuance of the rights of the mortgagees, and is to terminate if the mortgagor should

redeem. The plaintiff in the present action is properly made a party to it, because under the agreement between him and the mortgagees it would be improper for them to enter into such a lease without his express authority.

FALCONBRIDGE, C.J.:—I concur.

BRITTON, J.:—I think a mortgagee in possession would be an "owner" whose goods would be liable to seizure for taxes.

A person who goes into possession under an absolute agreement with the owner of the equity of redemption, or with the mortgagee, to purchase, would, in my opinion, be an "owner" within the meaning, and for the purposes of, cl. 3 of sub-sec. (1) of sec. 135 of the Assessment Act, R. S. O. ch. 224.

Appeal dismissed with costs; BRITTON, J., diss.

J. J. Warren, Toronto, solicitor for plaintiff.

T. Herbert Lennox, Toronto, solicitor for defendant.

BOYD, C.

MAY 19TH, 1902.

WEEKLY COURT.

Re C. P. R. CO. AND CITY OF TORONTO .

Landlord and Tenant—Agreement for Lease—Covenants—Taxes—Local Improvement Rate—Re-entry—Repair—Interest—Exemption—R. S. O. ch. 224, sec. 7, sub-sec. 7.

Appeal by the company from the report of Mr. Cartwright, an official referee, upon a reference to him to settle the terms of a lease of lands by the city corporation to the company.

E. D. Armour, K.C., and Angus MacMurchy, for the company.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the corporation.

BOYD, C.:—As to the covenant to pay taxes, the company, having possession of the property under lease from the city "for successive terms of 50 years each during all time to come," are for all practical purposes, and within the meaning of the Assessment Act, the owners, and as such liable for taxes without recourse to the owner in fee. But, apart

from this, while held as property of the city, this place was not subject to taxation, yet when occupied by a tenant or lessee the exemption is removed and the property so circumstanced becomes taxable: R. S. O. ch. 224, sec. 7, sub-sec. 7.

The incidence of such taxation plainly falls upon the tenant or lessee, and not upon the city. It is strictly a tenant's tax, or tax payable by the tenant, and not in any event payable by the landlord as between him and the tenant. Whether the leasehold property held by the city in fee and occupied by the company as tenants is to be considered as land exempt from taxation, and only the interest of the tenant assessable in respect of his beneficial occupation, or whether it be that the tax is imposed on the land in respect of the occupation by the tenant of the municipality, either way the person to pay the taxes is the tenant, and not the landlord. There is no liability on this landlord to pay in respect of the occupation of this tenant, and if this position be correct, sec. 26 has no application, for that applies to taxes which can legally be recovered from the owner and no other. These are payable by the tenant, and cannot be deducted from the rent or recovered from any other source by the tenant, who is alone liable. As to the special agreement validated by statute, by its very terms it is not self-contained (so to speak). It contemplates and provides for the execution of a lease to carry out the contract. In itself it is silent on the matter of taxes, and to insert a proviso or covenant for the payment of taxes by the occupant or tenant of the city property is not repugnant to anything contained or expressed or even implied in that validated agreement.

Appeal dismissed upon the ground relating to covenant to pay taxes inserted in lease in question, but covenant should be inserted as to all works agreed to be performed and provided by the city in the validated agreement; in respect of this no local improvement rate should be levied upon the property. Appeal allowed as to the insertion of a covenant to repair in the lease in question, and it should be struck out. The covenant as to re-entry should be limited to non-payment of rent, and report varied accordingly. Appeal as to interest on gales of rent in arrear allowed, and report varied accordingly. In other respects appeal dismissed. Costs of appeal to be taxed and paid to the city corporation, less one-fifth to be deducted as representing the points on which the company succeeded.

MacMurchy, Denison, & Henderson, Toronto, solicitors for the company.

T. Caswell, Toronto, solicitor for the corporation.

ROBERTSON, J.

MAY 22ND, 1902.

WEEKLY COURT.

CLARRY v. BRODIE.

Injunction—Undertaking to Speed Trial—Breach of.

Motion by defendants to dissolve an injunction for alleged breach of undertaking to speed the trial.

S. C. Smoke, for defendants.

H. S. Osler, for plaintiff.

ROBERTSON, J.:—I think the plaintiff has not quite satisfactorily accounted for the delay, as the case was due to be entered for trial immediately after the 17th February; and if it had been reached in 3 weeks thereafter would be due to be entered on the peremptory list. But defendant could have so entered it, as well as plaintiff; and when called, if plaintiff was not then ready, the trial would be put off on cause being shewn to the satisfaction of the trial Judge. So that I think, on the whole, there is no case made out, on the grounds alleged, to warrant me in dissolving the injunction; and I am obliged to dismiss the motion, but, under the circumstances, only with costs in the cause to the successful party.

MAY 19TH, 1902.

DIVISIONAL COURT.

RE CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Public School—School Site—Change of—Meeting of Ratepayers—Invalid Arbitration and Award—Mandamus—59 Vict. ch. 70, sec. 31, sub-sec. 3 (O.)

Appeal by the trustees from an order of FALCONBRIDGE, C.J., dismissing their motion for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures for \$1,000 for the purpose of the purchase of a school site and the erection of a school house thereon, and to issue the debentures as they should be required by the appellants. All steps necessary to entitle the appellants to require the by-law to be passed and the debentures to be issued were regularly and properly taken, unless the proceedings to change the school site were adopted in contravention of the provisions of sec. 31, sub-sec. 3, of the Public

Schools Act, 59 Vict. ch. 70, because of an award made on 24th February, 1899, determining that no change should be made in the site, which, if a valid award, according to the provisions of the sub-section, was to be binding for at least five years after its date.

W. R. Riddell, K.C., for appellants. This award is invalid. It is void because, according to sec. 31, sub-sec. 2, it is only after the trustees have decided upon a change of site, and thereafter at the meeting of the ratepayers of the section called pursuant to sub-sec. 1, a difference is found to exist between a majority of the ratepayers present at the meeting and the trustees as to the suitability of the site selected by the trustees, that an arbitration is to take place, and because the trustees did not, before the special meeting of the ratepayers in 1899, make any selection of a site. It also appears that the majority of the ratepayers voted in favour of a change of site, and that the question was submitted to and dealt with by the ratepayers without any selection of site having been first made by the trustees.

H. F. Hunter, Bowmanville, for respondents.

The judgment of the Court (MEREDITH, C. J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.:—After the best consideration I have been able to give to the matter, and reading the section in the light of the history and course of the legislation on the subject with which it deals, it appears to me that “the selection of a site for a new school house” means a selection of a site for a school house in a newly established school section, and probably also the selection of a site for an additional school house, if that is thought to be necessary to be provided. The mode of doing this which is prescribed is, first, the selection of the school site by the trustees, then, the calling of a special meeting of the ratepayers of the section to consider the site selected, when, if the majority of the ratepayers present at the meeting approve of the selection made, the site is adopted, but, if a majority of the ratepayers differ from the trustees as to the suitability of the site selected, an arbitration takes place, and the arbitrators are authorized to make and publish an award upon the matter submitted to them; and that the other case provided for, “the change of site for an existing school house,” is where a site has once been chosen and a school house has been provided. but it is thought by the trustees to be desirable that that site should be abandoned and a new site chosen on which the school house of the section is to stand, and that

in that case the trustees are empowered to agree upon a change of site, but it cannot be made without the consent of a majority of the ratepayers present at a special meeting called for the purpose of considering the site selected by the trustees, unless where the majority of the ratepayers present at the meeting differ from the trustees as to the suitability of the site selected by the trustees, the result of the arbitration provided for is an award in favour of the decision come to by the trustees.

If this be so, a determination of the trustees not to change the site, but to erect a new school house on the existing site, is not within the section.

It was at one time expressly provided that, if the ratepayers did not assent to a change of site proposed by the trustees, the change could not be made, but the more recent legislation modified this provision so that the change may be made though the majority of the ratepayers are opposed to it, if the result of the arbitration is a determination in favour of the view of the trustees.

In every one of the forms in which the subject of the selection of a site for a new school house or the change of site is dealt with, provision is made for a decision being first come to by the trustees, and I find nowhere in any legislation on the subject, including the section (59 Vict. ch. 70, sec. 31) under consideration, any ground for the view that the ratepayers may initiate proceedings for either purpose. Their intervention is to take place after, and only after, the trustees have come to a decision, and, subject to the provision as to the effect of the award of the arbitrators, it is to control the action which the trustees have determined upon and to prevent effect being given to the decision of the trustees if it is opposed to their (i.e., the ratepayers') view as to what ought to be done.

This distinction is not one of mere form, but of substance, and the provision as to the meeting of the ratepayers is, in effect, the application of the principle of the referendum, with a provision for arbitration if the vote of the ratepayers is in the negative on the proposition submitted to their vote.

I am of opinion, for the reasons I have given, that the position taken by the appellants that the arbitration and award set up by the respondents were unauthorized and nugatory, is well taken.

The learned Chief Justice was of the opinion that, the award being on the face of it a valid award, it was not proper to determine the questions raised as to it on the motion of the appellants for a mandamus.

I am, with respect, unable to agree with that view. I do not see in what way the validity of the award is to be determined unless it be on the application for the mandamus. The award having been made, as I think, without jurisdiction, it is not necessary that it should be set aside; it was mere waste paper, and the only objection taken, or that could be taken, to the application made by the appellants to the respondents to pass the by-law, therefore, falls to the ground.

I would allow the appeal, discharge the order of the learned Chief Justice, and substitute for it an order for the issue of the mandamus as asked, with costs.

Simpson & Blair, Bowmanville, solicitors for the applicants.

H. F. Hunter, Bowmanville, solicitor for the respondents.

_____ E. J. M.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING MAY 31ST, 1902.)

VOL. I.

TORONTO, JUNE 5, 1902.

NO. 21.

FALCONBRIDGE, C.J.

MAY 26TH, 1902.

TRIAL.

TOWN v. ARCHER.

*Medical Practitioner—Malpractice—Limitation of Actions—Onus of
Proof of Want of Care—Carelessness of Patient.*

Action by plaintiff against the defendants, who are physicians and surgeons in the village of Port Perry. In May, 1899, the plaintiff fell and sustained injuries in her left ankle and foot, and she alleges that the defendants negligently, improperly, and unskillfully treated her, and her foot has become distorted and twisted, and she has been rendered permanently lame. The plaintiff is 60 years of age. The writ was issued on the 1st December, 1900.

N. F. Paterson, K.C., and S. S. Sharpe, Uxbridge, for plaintiff.

A. B. Aylesworth, K.C., J. H. Moss, and W. H. Harris, Port Perry, for defendants.

FALCONBRIDGE, C.J.—The action fails under R. S. O. ch. 176, sec. 41, not having been brought within a year from the termination of the defendants' services. It is clear that when the plaintiff called at the offices of the defendants on the 21st December, 1899, and on the 11th January, 1900, she did not go in the continued relation of patient, but as a person who had a grievance and was dealing with the defendants more or less at arms' length. She had called in another doctor to look at her foot on the 13th December, 1899, and had consulted a solicitor during the same month, and her conduct was tantamount to a dismissal of the defendants. On the merits, in an action of this kind, the onus of proof is on the plaintiff to shew that there was a want of due care, skill, and diligence on the part of the defendants, and that the injury was the result of such want of care, etc. The general rule is summed up by Erle, C.J., in *Rich v. Pierpont*, 3 F. & F. at p. 40. See also *Lamphier v. Phipos*, 8 C. & P., per Tindal, C.J., at p. 479. The dislocation of the astragalus sustained by plaintiff is admittedly infrequent, difficult of diagnosis, especially where there is a swelling of the parts, and one in which perfect restoration

is not, at the plaintiff's time of life, to be expected. Technically speaking the breaking or carrying away of portions of the periosteum constitutes a fracture, and on the evidence such a fracture cannot be expected to be disclosed after a lapse of two years by the aid of the X-ray. The sciograph is not a photograph; it is a shadow, and at present is not an infallible guide in fractures; to this extent at least, that it will not always disclose the line of fracture; and the possibility is that the bony covering being re-united might not shew at all. Assuming the diagnosis to have been correct, the preponderance of evidence shews that the treatment adopted was in accordance with good surgery. If it came down to a question between negligence or malpractice on the part of the defendants on the one hand, and the extreme improbability, even under favourable conditions, of perfect or even approximate restoration of the patient, the doctors in charge ought to have the benefit of the doubt. But there is abundant evidence to shew that the present unfortunate condition of the plaintiff is due to her own conduct in relaxing the bandages. Action dismissed with costs.

Paterson & Sharpe, Uxbridge, solicitors for plaintiff.

W. H. Harris, Port Perry, solicitor for defendants.

FALCONBRIDGE, C.J.

MAY 28TH, 1902.

WEEKLY COURT.

RE COVENANT MUTUAL LIFE ASSOCIATION OF ILLINOIS.

*Life Insurance—Insolvent ' Foreign Company—Deposit—Surplus
after Payment of Canadian Claims—Interest on Claims.*

Appeal by creditors, certain policyholders, from certificate of Neil McLean, an official referee, in a winding-up proceeding. The company was admittedly insolvent when the winding-up order in Canada was made on 25th May, 1900, but the company went into liquidation in the United States in December, 1899. The deposit (required by the Insurance Act and amendments) is sufficient to cover the appellants' claims, and there remains a balance of \$1,900. The certificate disallows interest upon the claims.

C. A. Masten, for appellants. The referee was in the position of a jury and could have allowed interest: *McCullough v. Newlove*, 27 O. R. 630; *Attorney-General v. Ætna Ins. Co.*, 13 P. R. 459: and interest is clearly allowable: secs. 113 and 115 Judicature Act. The rule followed by the referee that interest is not recoverable because of insolvency does not apply, because here there is a surplus: *Re Hunter Iron Works*, L. R. 4 Ch. 643; *Woodcock's Case*,

16 Sol. J. 517; Re Commercial Bank of Manitoba, 10 Man. L. R. 187. No technical effect should be given to the mere fact of there being a winding-up order. R. S. C. ch. 124 defines terms upon which deposits are to be made and their application, and deposits are segregated from the general assets of a company and set apart for the purposes defined in sec. 107 of R. S. C. ch. 129.

W. B. Raymond, for foreign liquidator. The company is insolvent. The winding-up order of May, 1900, so expressly declares, and it has not been appealed from. The ordinary rules do not govern this case, but those do which apply to liquidation of companies: Ex p. Furneaux, 2 Cox Eq. Cas. 219; Re Intercolonial Contract Co., L. R. 13 Eq. 623; Rawlins & MacNaghten's Company Law, p. 379. The deposit is an asset of the insolvent company, sent from its head office in Galesburg, Illinois, and the American policy-holders will not be paid in full.

J. McBride, for Canadian liquidator.

FALCONBRIDGE, C.J.—This is a case in which a jury could and should have allowed interest at the legal rate. The rule as to interest in insolvency cases does not apply here, the question being simply one as to the application of the deposit under the terms of sec. 107. The company, being able to pay in full, should do so. Appeal allowed. Costs of all parties out of fund.

MAY 29TH, 1902.

DIVISIONAL COURT.

SHERLOCK v. WALLACE.

Deed—Absolute in Form, but Intended as Collateral Security—Redemption—Waiver—Counsel at Trial—Mistake.

Appeal by plaintiff from judgment of FERGUSON, J., ante p. 54.

T. W. Crothers, St. Thomas, for plaintiff.

J. M. McEvoy, London, and W. A. Wilson, St. Thomas, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J., who said that, upon the findings below, the plaintiff was entitled to redeem upon payment of what was due upon the security, and that there must have been a misunderstanding as to the concession of counsel that, if the Judge thought that plaintiff had no right to profits, the action should be dismissed. The evidence shews that the counsel meant that the question of profits was the question to be determined at the trial, and not that he meant to waive the

plaintiff's right to redeem. Judgment directed to be entered for plaintiff for redemption, with a declaration that plaintiff is not entitled to credit for profits upon the stock transactions. No costs to either party up to hearing. Costs of appeal to plaintiff, to be set off. Further directions and subsequent costs reserved.

MAY 29TH, 1902.

C. A.

REX v. RICE.

*Criminal Law—Murder—Conspiracy—Charge to Jury—Verdict—
Criminal Code, secs 61 (2), 227 (d), 228 (a), (2).*

Case reserved by FALCONBRIDGE, C.J., at the Toronto Autumn Assizes, 1901. The prisoner was indicted for the murder of William Boyd on the 4th June, 1901. There was only one count in the indictment. The evidence shewed that the prisoner, Fred Lee Rice, and two other men, Rutledge and Jones, were on the day in question being driven in a cab through the streets of the city of Toronto, all three handcuffed together (they being at the time under trial for burglary), with Boyd and another man, both constables, sitting opposite to them in the cab, when, at the corner of Gerrard and Sumach streets, a parcel containing two revolvers was thrown into the cab. The weapons were seized by Rice and Rutledge, and Boyd was shot dead. The trial Judge in his charge divided the case into two branches, first, whether Rice's hand fired the shot which killed Boyd, and second, if not, whether Rice was guilty of murder, under the circumstances, if the hand of one of the other men fired the shot. The Judge told the jury that up to the time the weapons were thrown into the cab, there was no evidence of a conspiracy or collusion, but that after that there might have been a common resolve to escape from lawful custody, and, if there was such common resolve or design, that Rice might be found guilty of murder. The jury disagreed as to the first branch of the case, and found the prisoner guilty on the second branch. Three questions were reserved for the consideration of the Court: (1) Was there any sufficient evidence to warrant the verdict? (2) Was the Judge's direction to the jury on the question of conspiracy or common design correct? (3) Was the finding of the jury a proper one, or was there a mistrial.

T. C. Robinette, for prisoner.

J. R. Cartwright, K.C., and Frank Ford, for Crown.

ARMOUR, C.J.O.—I am of the opinion that there was sufficient evidence to warrant the verdict as found by the

jury, that the direction of the learned Chief Justice to the jury on the question of conspiracy or common design was not one of which the prisoner could complain, that the verdict of the jury was a proper one, and that there was no mistrial.

The law is that "if several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose:" Criminal Code, sec. 61 (2).

And culpable homicide is murder in the following case: "If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one:" Criminal Code, sec. 227 (d).

Culpable homicide is also murder in the following case, whether the offender means or not death to ensue, or knows or not that death is likely to ensue: If he means to inflict grievous bodily injury for the purpose of facilitating his escape from lawful custody, and death ensues from such injury: Criminal Code, sec. 228 (a), and sub-sec. 2.

The evidence shewed that immediately upon the parcel containing the revolvers being thrown into the cab, the prisoner and Rutledge, at all events, and perhaps Jones, armed themselves with these revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of Boyd was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a probable consequence of the prosecution of such common purpose; each of them was therefore a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of the offence, the evidence, in my opinion, fully warranting their verdict.

There was nothing, in my opinion, in the charge of the learned Chief Justice, nor in his subsequent instructions to the jury, both of which must be read together, of which the prisoner could properly complain.

The jury in coming into Court and their foreman saying, "On the first count we disagree," and on being asked by

the clerk, "How do you find on the second count?" saying, "On the second count we find the prisoner guilty," were obviously referring to the two propositions or branches of the case submitted to them by the learned Chief Justice.

Their verdict must, however, be taken to be the verdict recorded by the learned Chief Justice on the back of the indictment, and acknowledged by the jury to be their verdict in these words: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The finding of the jury was, therefore, a proper one, and there was no mistrial.

The conviction will therefore be affirmed.

OSLER, J.A., delivered a written opinion concurring. MACLENNAN, MOSS, GARROW, JJ.A., verbally concurred.

MAY 21ST, 1902.

C. A.

FRANKEL v. G. T. R. CO.

Appeal to Supreme Court of Canada—Leave.

Motion, *ex cautela*, by defendants for leave to appeal to the Supreme Court of Canada from the judgment of this Court, ante p. 254.

H. E. Rose, for defendants.

G. F. Shepley, K.C., for plaintiffs.

The Court (OSLER, MACLENNAN, GARROW, JJ.A.) was of opinion that both on claim and counterclaim the defendants had the right to appeal without leave; but that, if leave were necessary, it was not a case in which it would be granted. Motion dismissed with costs, without prejudice, so far as this Court can say so, to the defendants' right to apply direct to the Supreme Court for the leave desired.

Decision of MACLENNAN, J.A., in Chambers, ante p. 339, approved.

MAY 30TH, 1902.

DIVISIONAL COURT.

RE CAMPBELL AND HORWOOD.

Will—Construction—Power to Sell—Executors—Trust.

Appeal by vendor from order of LOUNT, J., ante p. 139.

M. J. Gorman, Ottawa, for vendor.

F. C. Cooke, for purchaser.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—I think the effect of the will of Colin Campbell, of Weymouth, dated 28th December, 1875, was to vest all the testator's real estate except the dwelling-house in his six daughters in fee, subject to a power of sale in the executors, and subject also to a restraint on alienation by them of their shares during their lives, as to the effect of which it seems unnecessary to inquire. Colin Campbell, of Ottawa, son of the testator, appears to have made certain claims against his father's estate, which were finally compromised, with the consent of the six daughters, by the payment to him of \$2,000 in cash, and by an agreement to convey the lot in question to a trustee for his children. Before this conveyance was made, he also died, and by his will he recited that he had held the land in question as trustee for his children since 1882 or 1883, by virtue of a quit claim deed from his father's estate; and he directed that his widow should hold the lot as trustee for his children; and that it should be sold to the best advantage on his youngest child coming of age, and the proceeds equally divided amongst his children.

Colin Campbell, of Ottawa, died in October, 1896, and on 9th April, 1900, the executor of Colin Campbell, of Weymouth, in pursuance of the agreement of compromise above mentioned, conveyed the land in question to the present vendor, the widow of Colin Campbell, of Ottawa, her heirs and assigns, in trust for the children of Colin Campbell, of Ottawa, in equal shares.

In my opinion, this conveyance passed the estate in the land to the present vendor as trustee for the children of Colin Campbell, of Ottawa. The executor of Colin Campbell, of Weymouth, had a power of sale under the will, and the agreement with Colin Campbell, of Ottawa, for the conveyance to the nominee of the latter, as part of a compromise of the large claim made by him against his father's estate, was a proper exercise of the power of sale, and was confirmed as such by the persons entitled to the land subject to the power. But from the time of the execution of the agreement Colin Campbell, of Ottawa, ceased to have any beneficial interest in or power over the land; it was vested from that time in the executor of Colin Campbell, of Weymouth, as trustee for the children of Colin Campbell, of Ottawa; and therefore the clause in the will of the latter in which he purports to make his widow trustee of it for his children and to give her a power of sale of it were of no effect, excepting merely that of nominating the trustee who was to take the title in trust for his children.

The effect of the conveyance to the vendor, Mrs. Campbell, on 9th April, 1900, from the executor of Colin Campbell, of Weymouth, was, therefore, to vest in her the estate which had been vested in that testator, but to vest it in her as a bare trustee for the children of Colin Campbell, of Ottawa, without any power to sell it. Having no power to sell it, she cannot make title to it to the purchaser, and the appeal must be dismissed with costs.

M. J. Gorman, Ottawa, solicitor for vendor.

D. H. Maclean, Ottawa, solicitor for purchaser.

OSLER, J.A.

MAY 29TH, 1902.

C.A.—CHAMBERS.

BROWN v. MCGREGOR.

Appeal—Extension of Time—Laches—Security.

Motion by the plaintiff to extend time for setting down appeal.

J. H. Moss, for plaintiff.

D. L. McCarthy, for defendant.

OSLER, J.A.—The course of the case has been as follows :—

Trial—the second trial—before FALCONBRIDGE, C.J., 16th September, 1901, and judgment by him 27th December, 1901, dismissing the action.

Notice of appeal 6th February, 1902. Reasons of appeal 10th February, 1902. Time for delivery of reasons contra, extended on 12th February, 1902, at request of the respondent. Draft appeal case sent by appellant to respondent 25th February, 1902, but without the evidence taken at the second trial, which appellant had up to this time been unable to obtain from the stenographer. 10th March, 1902, draft case returned by respondent's solicitor, with reasons against appeal, but objecting to insertion in the case of any part of the examination for discovery, except what had been read at the trial.

The appellant would not accede to this perfectly proper objection, and the result was a motion before the trial Judge to settle the case. This was disposed of adversely to the appellant on the 26th March, 1902. No further step was taken by him until the 5th April, when new reasons of appeal were served, omitting those which had been rested on the deleted parts of the examination for discovery.

On the 23rd or 24th April the appellant obtained copy of the evidence, and then rested until the 5th May, when amended draft appeal case was sent to the respondent's solicitor, which he returned with the objection that the appellant was out of time and in default, for not having

set down the case for hearing for the session of the Court which began on the 14th April.

Judgment has been signed and costs of defence taxed at nearly \$700, and an affidavit is filed shewing that the appellant has recently been placing incumbrances on his property and has disposed of the equity of redemption.

If the case had been set down, as it might have been under Rule 812 (2), for the April session, it could have been and probably would have been heard thereat, as the evidence was obtained on the 23rd or 24th April; or the appellant might have moved for a fiat to set down notwithstanding the absence of the evidence, and the Court might have imposed terms. The delay has been very great, and I find nothing which I can lay hold of as an excuse, beyond this, that it has no doubt been the intention of the appellant in good faith to prosecute this appeal, and his solicitor was probably not familiar with the Rule I have referred to. It does seem not to be very generally known, but, on the other hand, the general practice has been to move for a fiat to set down the appeal notwithstanding the absence of the evidence. This precaution was not observed. The respondent has reason to complain of the delay which now throws him over until September, if the appellant's motion is granted, and he is left with the costs of the action unpaid and unsecured, the appellant's property in the meantime having been put out of his hands. While I express no opinion on the merits of the appeal, I cannot but see that it turns very much upon questions and findings of fact, and on the main facts of the case there have been two decisions against the appellant.

On the whole I am of opinion that I should dismiss the motion with costs, unless the appellant, within——days, gives sufficient security for the payment of the costs taxed in the action and interest thereon, and the costs of this motion in case his appeal is unsuccessful.

Ball & Ball, Woodstock, solicitors for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

MACLENNAN, J.A.

MAY 31ST, 1902.

C. A.—CHAMBERS.

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

*Appeal—Jury Notice—Jurisdiction of Judge in Chambers as to
—Judicature Act, sec. 110.*

Motion by defendant for leave to appeal from order of a Divisional Court affirming an order of a Judge in Cham-

bers striking out a jury notice filed by defendant in an action of covenant upon two building society mortgages. Defence that the defendant was induced to execute the mortgages without reading them, or understanding their true effect, by false and fraudulent representations.

W. H. Bartram, London, for defendant.

D. W. Saunders, for plaintiffs.

MACLENNAN, J.A.—The ground of the present application expressed in the notice of motion, and argued by Mr. Bartram, is that the decision involves questions of law and practice upon the construction of sec. 110 of the Judicature Act, in which there have been conflicting decisions or opinions by the High Court of Justice and by the Judges thereof. This ground is the only one upon which, under sec. 77 of the Judicature Act, it was open to him to rest his motion, for the case clearly does not fall within any of the sub-sections of sec. 4, unless it falls within (c).

Mr. Bartram cited the following cases: Bristol, &c., Co. v. Taylor, 15 P. R. 310; Hawke v. O'Neill, 18 P. R. 164; Bank of Toronto v. Keystone Fire Ins. Co., 18 P. R. 113; and Sawyer v. Robertson, 19 P. R. 172.

I have examined these cases and also those cited by Mr. Saunders: *Lauder v. Didmon*, 16 P. R. 74; *Regina v. Grant*, 17 P. R. 165; *Toogood v. Hindmarsh*, 17 P. R. 446; *Skæ v. Moss*, 18 P. R. 119.

The only conflict of decisions which I find in these cases is between *Bank of Toronto v. Keystone Fire Ins. Co.*, decided by a Divisional Court on 4th May, 1898, and the earlier case of *Skæ v. Moss*, decided by a Divisional Court in February, 1896, the latter case not having then been reported, and not having been cited in the subsequent case. The point decided in those cases, however, has no bearing upon the present, that point having been whether a Judge at the trial has power to strike out a jury notice, and to transfer the action for trial at the non-jury sittings.

The power of a Judge in Chambers under sec. 110 to strike out the jury notice has never been doubted in any case, although Street, J., in one case expressed the opinion that in general it ought not to be done. But that opinion does not appear to me to be a conflict of decisions or opinions within sub-sec. (c) of sec. 77 (4) of the Act.

The motion will be refused with costs.

W. H. Bartram, London, solicitor for defendant.

Hellmuth & Ivey, London, solicitors for plaintiffs.

MAY 30TH, 1902.

C. A.

CENTAUR CYCLE CO. v. HILL.

Appeal—Order of Judge of Court of Appeal in Chambers—Appeal to Court—Execution—Leave to Issue Notwithstanding Appeal—Discretion of Judge—Special Circumstances—“Court Appealed to or Judge thereof”—Rule 827 (1).

Appeal by defendants from order of MACLENNAN, J.A., ante p. 377.

The same counsel appeared.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.—First, as to the competency of the appeal. The order of my learned brother is one made in relation to a pending appeal—a matter in Court—and in that respect is not like an order made in a matter external to its ordinary jurisdiction in pursuance of some authority conferred by a statute upon the Court or a Judge of the Court *pro hac vice*, e.g., under the Dominion Railway Act: *Re Toronto, Hamilton, and Buffalo R. W. Co. and Hendrie*, 17 P. R. 199. In the latter case it may well be that, when a Judge makes an order, he does so as *persona designata*—as one of the two jurisdictions upon whom an alternative authority is conferred to do the act. Here the order is made in the cause to remove the stay of execution under the authority of the Rule of Court, 827 (1), “unless otherwise ordered by the Court appealed to, or a Judge thereof,” &c. I see no tangible distinction between these words as here used, and the words “the Court or a Judge,” and the meaning of the latter, when used in a statute or rule of Court in relation to jurisdiction over proceedings in a cause or matter, is well recognized. “The Court.” means a Judge or Judges in open Court; a “Judge” means a Judge sitting in Chambers: *In re B.*, [1892] 1 Ch. 459, 463; or, as Brett, J., said in *Baker v. Vokes*, 2 Q. B. D. 171, 175, using the old terminology, “a Court or Judge” means the Court sitting in banc or a Judge at Chambers representing the Court in banc. See also per the same Judge in *Dallow v. Garrold*, 54 L. J. Q. B. 78: “The statute gives the power to the Court or a Judge, and it is well recognized that that phrase always includes a Judge at Chambers, unless there is some express enactment limiting the meaning of the phrase.”

And see *Re Housing of the Working Classes Act 1890*, *Ex p. Slieman*, [1892] 1 Q. B. 394. From the order of a

Judge thus sitting in Chambers, unless it is one made purely in the exercise of his discretion, an appeal, in my opinion, lies to the full Court: Arch. Prac., vol. 2, p. 1,609.

Then, secondly, I do not think that the order in question is a purely discretionary order. The general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected. Nevertheless, if "the Court or a Judge thereof" otherwise orders, the stay of execution may be removed. A proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause.

Upon the whole, after having given the matter a good deal of consideration, we are all of opinion that, under the circumstances, an order for leave to issue execution ought not to go. The appeal appears to be prosecuted in good faith, and on substantial grounds. The defendant is carrying on his business in the usual way, and the effect of an execution will practically be to close it up, and possibly to place the defendant in a situation from which he will find it difficult, if not impossible, to recover if his appeal should be successful. The plaintiffs do not make a *prima facie* case against the bona fides of the instruments which they propose to attack. They desire to proceed by way of seizure and interpleader, but they can proceed quite as effectively by way of action, and, while the rights of the parties are in suspense, the method likely to be least injurious to the defendant ought to be followed. Apart from the property which it is desired to reach by impeaching the chattel mortgages there seems to be nothing to be secured or laid hold of by the execution, and therefore as to neither of the defendants does it appear that there is any special advantage gained in the nature of security, etc., by removing the stay. The order will therefore be discharged, and the costs of appeal, and of the motion it deals with, will be costs in the appeal.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 7TH, 1902.)

VOL. I.

TORONTO, JUNE 12, 1902.

No. 22.

FALCONBRIDGE, C.J.

JUNE 3RD, 1902.

WEEKLY COURT.

WALKERTON BINDER TWINE CO. v. HIGGINS.

Company—Lien of —Shares.

Motion by plaintiffs to continue an injunction restraining defendant from selling or transferring certain shares of the stock of the plaintiffs, an incorporated company. The defendant was the contractor for the plaintiffs' building. He received in January, 1901, in part payment of the contract price, a cheque for \$22,832, which, plaintiffs allege, should have been for \$22,384. In the final settlement he received in part payment the stock in question, which is fully paid.

G. H. Kilmer, for plaintiffs. The plaintiffs claim a lien on two grounds: (1) of debt; (2) part of the price payable under the contract is represented by the shares, and in effect plaintiffs have the right to stop the shares in specie in the hands of defendant. As between the parties there is a lien in favour of plaintiffs: *Lindley's Company Law*, p. 456; *Pinket v. Wright*, 12 Cl. & F. 764; *Hague v. Danderson*, 2 Ex. 741; *McMurrich v. Bond Head Co.*, 9 U. C. R. 333.

M. H. Ludwig, for defendant. It is clear that no lien exists. The only case in which the company can refuse to register a transfer is set forth in R. S. O. ch. 191, sec. 28. See also *White on Joint Stock Companies*, p. 181.

FALCONBRIDGE, C.J.—The high authority of Lord Lindley is pledged to the dictum (*Lindley's Law of Companies*, 5th ed., p. 456) that a company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares.

The defendant does not categorically deny the mistake which is said to have been made in the figures whereby plaintiffs claim to have overpaid defendant by the sum of \$448, but only says in a general way that he is "not indebted to the plaintiffs in any sum whatever."

I think the *status in quo* ought to be preserved, and I shall continue the injunction to the hearing.

Costs in cause unless the trial Judge shall otherwise order.

David Robertson, Walkerton, solicitor for plaintiffs.

Ritchie, Ludwig, & Ballantyne, Toronto, solicitors for defendant.

JUNE 2ND, 1902.

DIVISIONAL COURT.

DUNN & CO. V. PRESCOTT ELEVATOR CO.

Bailment—Warehouseman—Negligence of—Stored Corn—Measure of Damages.

Appeal by liquidator of defendants from judgment of MACMAHON, J., ante p. 75.

G. F. Henderson, Ottawa, for appellants.

J. Leitch, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The duties of defendants under the circumstances are concisely and properly stated in *Beal v. South Down R. W. Co.*, 3 H. & C. at p. 342. See also *Story on Bailments*, secs. 444 and 408; *Brabant v. King*, [1895] A. C. at p. 646; *Snodgrass v. Ritchie*, 17 Rettie, 712; *Re Mersey Docks*, 1 H. L. C. 93. . . . In my opinion the defendants were guilty of negligence in not having more carefully watched and examined the condition of the corn under the circumstances, and they are liable to the plaintiffs for the loss which has happened. The damages have been properly estimated, and the appeal should be dismissed with costs.

JUNE 2ND, 1902.

DIVISIONAL COURT.

RE GAULT v. CARPENTER.

Appeal—County Court—Interlocutory Order—Examination of Judgment Debtor—Production by Transferee of—Jurisdiction—R. S. O. ch. 55, sec. 52.

Appeal by judgment debtors and their mother, Elizabeth Carpenter, from order of a County Court Judge, made after

judgment in the action in the County Court of Stormont, Dundas, and Glengarry, directing the defendants, the judgment debtors, to attend for examination before a special examiner, and ordering the appellant Elizabeth Carpenter, their alleged transferee, to attend and produce at the same time the books of account used by the judgment debtors in their business.

The appeal was heard before a Divisional Court, FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. H. Moss, for appellants.

W. E. Middleton, for plaintiffs.

STREET, J.—In my opinion the order in appeal is clearly interlocutory and not final within the meaning of R. S. O. ch. 55, sec. 52, as interpreted by the Court of Appeal in *Baby v. Ross*, 14 P. R. at p. 443. Such an order is merely a means or step towards an end, it is not the end itself; and appeals are only given against orders which are the end of the particular matter of which they are a part.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—In agreeing I venture to express my regret that the question whether the learned County Court Judge has power to make such an order against the appellant Elizabeth Carpenter can not now be disposed of on its merits, without putting any of the parties to the expense of a motion against an order to commit, should any such order be made and the appellant further resist.

Appeal quashed with costs.

MacLennan, Cline, & MacLennan, Cornwall, solicitors for plaintiffs.

Gogo & Stiles, Cornwall, solicitors for other parties.

JUNE 4TH, 1902.

DIVISIONAL COURT.

GOODYEAR v. GOODYEAR.

Chattel Mortgage—Renewal of—Change of Possession—Parent and Child—Execution Creditor.

Appeal by claimant, a chattel mortgagee, in an interpleader issue from judgment of County Court of York. Issue as to the ownership of certain goods and chattels seized under writ of execution. The claimant and execution creditor were brothers. On the evidence the trial Judge was not satisfied of the validity and bona fides of the mortgage, and held that there being no clear or satisfactory evidence of change of possession, and the onus being upon the claimant to satisfy the Court as to his title

to the goods, judgment should be entered for execution creditor with costs.

The appeal was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.).

W. E. Middleton, for plaintiff.

James McCullough, Stouffville, for defendant.

STREET, J.—I think it is plain that Robert Goodyear, the father of the claimant Samuel Goodyear and of the execution creditor James Goodyear, was indebted to certain other persons at the time he made the chattel mortgage to his son Samuel Goodyear, and that shortly after making it he became indebted to the execution creditor James Goodyear. The mortgage appears to have been made having as one of its objects, if not its sole object, the protection of the chattels against the existing creditors. The consideration stated in the chattel mortgage is \$300, and it is sworn by the claimant that his father, the mortgagor, owed him this round sum partly for money lent and partly for wages, but the father, who is living, was not called to substantiate the truth of this story, as he should have been under *Merchants Bank v. Clark*, 18 Gr. 594.

The chattel mortgage was made on 13th January, 1896, and was renewed in 1897, 1898, and 1899. During these years the mortgagor was living on a place of which he and the mortgagee, his son, were joint lessees, but the son was living on another place. During the year 1899, however, the son moved on to the place, and he and his father lived there together until the expiration of the lease in the year 1901. In the meantime, however, viz., in December, 1899, the son advertised the goods in question for sale under the chattel mortgage, and bought them all in himself, and they were never moved from the place. The father and son, the claimant, then continued to live together upon the place until the father left in February or March, 1901. Before he left, the execution creditor recovered judgment and seized the goods under his execution. The mortgagee claimed them under the mortgage, and the present issue was thereupon directed. The learned County Court Judge upon these facts decided in favour of the execution creditor, stating that he was not satisfied that the mortgage was made bona fide, and that there was no proof of any change of possession of the goods from the mortgagor to the mortgagee, the chattel mortgage having expired before the seizure.

The amount in dispute is only \$44, and it is subject to the sheriff's costs and fees.

I am of opinion that the appeal should be dismissed. The claimant has produced no evidence but his own in support of his mortgage, although that of his father was available, and his own account of the matter under the circumstances appears to me unsatisfactory. Apart from this, however, I think it is plain that the claimant's position as a mortgagee was never changed; that his mortgage, not having been renewed in January, 1900, had expired as against creditors before the seizure by the sheriff, and that his title to the goods in question had not been completed as against creditors by any actual and continued change of possession before the seizure, for he and his father still occupied the premises upon which the goods had always remained and upon which they continued to remain until the seizure by the sheriff.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—With the greatest respect for the decision of my learned brother Street, whose opinion I have had the privilege of perusing, I regret that I am not able to agree.

I think the judgment of the learned County Court Judge is wrong and should be reversed, and that judgment should be entered for the claimant.

Appeal dismissed with costs; BRITTON, J., diss.

C. R. Fitch, Stouffville, solicitor for plaintiff.

James McCullough, Stouffville, solicitor for defendant.

JUNE 5TH, 1902.

DIVISIONAL COURT.

PATTISON V. TOWNSHIP OF WAINFLEET.

*Way—Non-Repair — Municipal Corporation — Negligence — Bridge
— "Traction Engine"—R. S. O. ch. 242.*

Appeal by defendants from judgment of County Court of Welland, in favour of plaintiff in an action for damages for personal injuries to plaintiff and for injury to an engine attached to a grain threshing machine which plaintiff was driving over a bridge in the township of Wainfleet, when the bridge gave way and the engine was thrown down into the bed of a creek below. The trial Judge found that the bridge was out of repair and unsound, to the knowledge of defendants, for a considerable time before the damage complained of; and that the engine, not being a traction engine within the ordinary meaning of that term, R. S. O. 1897 ch. 242, pleaded by defendants, did not apply, so as to relieve them

from responsibility, and gave judgment for plaintiff for \$75 damages and costs.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

L. C. Raymond, Welland, for defendants.

E. A. Lancaster, St. Catharines, for plaintiff.

STREET, J.—I think the evidence of negligence on the part of the defendants was sufficient to justify the finding of the learned Judge below upon that point, and that the damages found by him are reasonable. The only question is, whether the engine in question was a traction engine within the meaning of R. S. O. ch. 242, in which case it would have been the duty of the plaintiff before crossing the bridge to have strengthened it, under sec. 10 of the Act. This question is one of fact, and I think it has been properly found by the learned Judge in favour of the plaintiff. It appeared from the expert evidence given at the trial, and not contradicted, that the engine was not a traction engine within the ordinary and accepted meaning of the term, although it was constructed so as to be able to move itself and draw its tender containing fuel and water for its own use. It was explained that it was built for the purpose of furnishing power to a thresher or separator, and that the gearing which gave it the power of locomotion was entirely different from and very much lighter than that used in engines built for traction purposes.

There was no evidence that the plaintiff in moving the engine in question along the highway from farm to farm was making an unusual or improper use of the highway.

In my opinion, therefore, the judgment should not be disturbed, and the appeal should be dismissed with costs.

See *Toronto Gravel Road Co. v. Township of York*, 12 S. C. R. 517.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—The questions are questions of fact. I agree with the findings of the learned County Court Judge.

The duty of the municipality was to have this bridge strong enough for the ordinary traffic of the highway.

In a good agricultural township like Wainfleet, with farms well cultivated, the bridge should be sufficiently safe to permit of large loads of grain and farm produce and farm machinery being taken over it without risk. It was well known to the defendants how grain is separated and cleaned up, and it seems to me to make no difference whether by horse power or steam power, and, if by steam, whether the boiler and engine are taken upon a waggon and drawn by horses or

propelled along the road by its own steam power—the bridge in either case should be sufficient to safely carry an ordinary and reasonable load. I think the Legislature, in ch. 242, R. S. O., intended by “traction engine,” something very different in weight from the one owned by plaintiff.

The traction engine in that Act is an engine entirely different in construction and for a wholly different purpose from plaintiff’s.

The whole Act is to protect the public and public highways where traction engines are to be employed “for the conveyance of freight and passengers, or both, on any public highway in this Province,” and it does not apply to this case.

Appeal dismissed with costs.

Lancaster & Campbell, St. Catharines, solicitors for plaintiff.

Raymond & Cohoe, Welland, solicitors for defendants.

JUNE 2ND, 1902.

DIVISIONAL COURT.

TAYLOR V. DELANEY.

*Will—Testamentary Capacity—Unsustained Charges of
Fraud—Costs.*

Appeal by defendant from judgment of Surrogate Court of Essex, admitting to probate the will of R. Taylor, deceased, on the ground that he was of unsound mind, and incapable of making a will.

The appeal was heard before a Divisional Court, STREET, J., BRITTON, J.

F. A. Anglin, for defendant.

A. H. Clarke, Windsor, for plaintiff.

STREET, J. (after reviewing the evidence)—In my opinion, the judgment appealed from is right and should not be disturbed, and the present appeal must be dismissed with costs. I observe that the learned Judge gave no costs against Delaney at the trial. No reasons are given for this, or any other part of the judgment, and I cannot avoid calling attention to the rule which has been repeatedly laid down and followed, that in testamentary cases, where charges of fraud are made, as here, without any evidence being offered to support them, costs should be given against the person making them.

BRITTON, J.—It is the duty of an appellate Court, as was decided in *Russell v. Lefrancois*, 8 S. C. R. 335, “to review the conclusion arrived at by Courts whose judgments are

appealed from, upon a question of fact, when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case."

The proper inference to be drawn from the whole evidence in this case is, that the testatrix, at the time she made the will in question, had capacity to comprehend the extent of her property and the nature and claims of the plaintiff whom she was excluding from this, although he had been a beneficiary under a former will. See *Harwood v. Baker*, 3 Moore P. C. 290.

I am satisfied that Rose Taylor had testamentary capacity, and I so conclude by a consideration of what she said and did shortly before and at the time of, and shortly after, making her will, as against what medical experts thought her condition ought to have been.

The point as to undue influence was not pressed—the argument was wholly upon the question of testamentary capacity.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for plaintiff.

Murphy, Sale, & O'Connor, Windsor, solicitors for defendant.

BRITTON, J.

JUNE 5TH, 1902.

TRIAL.

SLAVEN v. SLAVEN.

Costs—Will—Action to Set aside—Separate Defence.

The plaintiff is a son of Eliza Slaven, who died on the 14th September, 1900, and this action was brought to set aside her will on the ground of undue influence and want of testamentary capacity.

G. F. Shepley, K.C., and C. H. Widdifield, Picton, for plaintiff.

G. Lynch-Staunton, K.C., R. D. Gunn, Orillia, M. R. Allison, Picton, J. R. Brown, Picton, D. L. McCarthy, and John A. Wright, Picton, for defendants.

BRITTON, J.—The parties came to an agreement, and consent minutes were filed, upon all points except as to costs of defendant Milo Slaven. He resisted plaintiff's contention, put in a separate defence by his own solicitor, and did not join in the settlement, but consented to it, claiming however to be entitled to costs.

Milo was a necessary party to the action, and plaintiff assumed the risk of liability for costs in case of failure. I think Milo is entitled to costs, and that plaintiff should pay them. As between plaintiff and defendants other than

Milo Slaven, provision for Milo's costs should have been made, and perhaps was made, and if so my decision will in no way affect any agreement made between plaintiff and defendants other than Milo.

From all that appears before me I can not say that the interests of Milo Slaven were so identical with those of the other defendants, that he should not have been separately represented. Had the case been fought to a finish and had defendants been successful, possibly one set of costs only would have been allowed. I can not say. This is, however, a case in which I should not send parties to a taxation, but should determine the amount of Milo's costs. He did not personally attend the trial, and there are no witness fees payable by him, so I fix the amount at \$40.

LOUNT, J.

JUNE 6TH, 1902.

TRIAL.

SKILLINGS v. ROYAL INSURANCE CO.

Fire Insurance—Notice to Company Terminating Policy— Given by Registered Letter Wrongly Addressed, Received Day After Fire—Ontario Insurance Act, Statutory Conditions 19a, 23.

Action by a firm of lumber merchants in Ogdensburg, New York, to recover amount of loss by fire under a policy issued by defendants and covering certain lumber at Parry Sound, Ontario. By agreement between the parties the following question, among others, was submitted for the opinion of the Court: "Was the policy in question cancelled or surrendered?"

W. R. Riddell, K.C., and A. Fasken, for plaintiffs.

C. Robinson, K.C., and C. S. MacInnes, for defendants.

LOUNT, J.—On the 30th May, 1901, the plaintiffs wrote from Ogdensburg to Mr. Lett, the defendants' agent at Barrie, as follows:

"Enclosed please find Royal policy 7535269 lumber located at Conger Lumber Company's yard at Parry Sound, Ont., expiring January 21st, 1902, which we wish to cancel as of June 5th. We make return premium as \$74.25. If correct kindly send us check for same and oblige." The policy was enclosed with this letter in an envelope, which, by mistake of the plaintiffs' stenographer, was not correctly addressed, the address being "Mr. F. A. Lett, Agent, Parry Sound, Ont.," when it should have been "Barrie," instead of Parry Sound. The policy had indorsed on it at the time, partly printed and partly written, the following: "Surrender. Received from the Royal Insurance Company the sum of \$74.25, being the consideration for the within policy,

which is hereby cancelled and surrendered." This was signed by the plaintiffs.

The post stamp on the envelope shews that it was received at the post office "Ogdensburg" on the 30th May, 1901, at the post office "Parry Sound" on the 31st May, 1901, and at the post office "Barrie" on the 6th June. It is admitted by the defendants that the envelope, with its contents, the letter and policy, were not received at Barrie by Mr. Lett until half-past eleven on the forenoon of the 6th June, and that it had been forwarded by the post master at Parry Sound by post to Mr. Lett at Barrie. The fire had taken place before the arrival of the letter at Barrie: it began about 11 p.m. on the night of the 5th June, and terminated by 5 a.m. on the 6th June. On the morning of the 6th June, and before the letter had been received by Mr. Lett, Mr. Bartlett, the agent at Orillia for the plaintiffs, telephoned Mr. Lett, informing him of the fire, and Mr. Lett, immediately after, and before the receipt of the letter, replied by letter, asking for information; and about the same time he telegraphed to the defendants at their head office, Montreal, informing them of the fire.

* * * * *

Condition 19a of the Ontario statutory conditions provides: "The insurance, if for cash, may be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid."

Condition 23: "Any written notice to a company for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent at such head office, or by such written notice given in any other manner to an authorized agent of the company."

May, on Insurance, 4th ed., vol. 1, sec. 67, says: "The right of cancellation on notice reserved by the terms of the policy to either party should be exercised with care that the notice be explicit and the conditions strictly complied with." And to the same effect, Joyce on Insurance, vol. 2, sec. 1,660: "The right to rescind or cancel can only be exercised by either party acting strictly in compliance with the exact stipulations of the policy relating thereto," citing with approval many American authorities, where the law in this respect is in the different States, and especially in the

State of New York, similar to condition 19a. See also judgment of MacMahon, J., in *Bank of Commerce v. British America Assurance Co.*, 19 O. R. 241, approving of *Runkle v. Citizens' Ins. Co.*, 6 Fed. Rep. 148: "The right, however, to terminate a contract of insurance which has been partly entered into and has taken effect by this method is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation." The learned Judge also refers to *May on Insurance*, *Chase v. Phoenix Mutual Life Ins. Co.*, 67 Me. 85, and *Hathorn v. Germania Ins. Co.*, 55 Barb. (N.Y.) 28, as to the strictness required in complying with the conditions cancelling a policy of insurance.

Condition 19a does not provide how the notice shall or may be given. Condition 23, however, says "any written notice to a company for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter, addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company."

No written notice was delivered at the defendants' head office in Ontario; in fact, it was not shewn that the defendants had a head office in Ontario; the only head office spoken of was at Montreal, and no written notice was delivered there. Nor was any registered post letter, or letter or notice of any kind, addressed or sent by the plaintiffs to the defendants, their manager or agent, at any head office.

Then, was a written notice given in any other manner to an authorized agent of the defendants? Was the letter of the 30th May with the policy, having the surrender thereof indorsed thereon, a sufficient notice to satisfy condition 19a, and was the receipt thereof by Mr. Lett, the authorized agent of the defendants, on the 6th June, after the fire had occurred and the property had been destroyed, a notice to the defendants in compliance with condition 23?

In my opinion, it was not. Upon the authorities, I must hold that a letter sent by post giving such notice is not notice by depositing the letter in the post office; it can only become so when received from the post office by the party to whom it is addressed.

The post office had not been made the agent of the defendants to receive such notice. The law is well settled that if an offer made by mail is accepted by mail the contract is complete from the moment the letter of acceptance is mailed, even if it is never received; but this does not apply here, because no negotiation was pending, no contract had been proposed in writing; the plaintiffs had not made

any offer in writing to the defendants that might or might not have been accepted. The plaintiffs sought to do an act that would be binding on the defendants, whether they were willing or not. The policy, and letter might have been sent by a messenger, who would have been the agent of the plaintiffs for the purpose. Having been sent by mail, it was none the less the agency of the plaintiffs than if a messenger had been sent. But it was necessary for the plaintiffs, in order to terminate the policy, to have the notice actually reach the defendants or their authorized agent, and the instrument selected for that purpose was the agent of the plaintiffs, not of the defendants; nor can the fact that the plaintiffs signed the form of surrender on the policy make any difference. It was not intended to operate and could not operate until received, and the defendants had complied with the terms of condition 19a, that is, paid to the plaintiffs the balance of the premium which the plaintiffs had paid to the defendants. Nor could it operate against the plaintiffs until delivery had taken place. The policy all the time until actually received by the defendants or their authorized agent being in the possession of the plaintiffs, during which time the property had been destroyed, the policy was, therefore, in force when the loss occurred; the character of the contract was changed from a contingent to a certain liability, and a cause of action based on an absolute debt forthwith accrued to the plaintiffs: *C. P. I. Co. v. Aetna Ins. Co.*, 27 N. Y. 608; *May on Insurance*, 4th ed., vol. 1, sec. 67, as to cancellation of policy: "Notice of cancellation, if given by mail, must be received before loss by the party entitled thereto, or by his agent authorized to receive the same, otherwise there is no cancellation;" *Joyce on Insurance*, vol. 2, sec. 1,669.

I have not lost sight of the fact that it was by the mistake of the plaintiffs in not addressing the letter of the 30th May to Mr. Lett at Barrie, that it was not received by him before the fire, but I do not see how this can in any way affect the question.

Having regard, therefore, to the agreement between the parties, I give judgment in favour of the plaintiffs for the amount claimed by them with interest from the 5th June, 1901, and with costs.

Beatty, Blackstock, & Co., Toronto, solicitors for plaintiffs.

McCarthy, Osler, Hoskin, & Creelman, Toronto, solicitors for defendants.

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No. 23.

JUNE 12TH, 1902.

DIVISIONAL COURT.

BOCK v. TOWNSHIP OF WILMOT.

*Master and Servant—Municipal Corporation—Pathmaster—Fellow
Servant—Caving in of Gravel Pit—Negligence.*

Appeal by plaintiffs from order of Judge of County Court of Waterloo setting aside verdict and judgment entered thereon for \$125 in action for damages for injuries sustained by infant plaintiff, S. Bock, 14 years old, and loss occasioned by his father, plaintiff D. Bock, by reason of a bank of gravel falling upon S. Bock, who was at the time in the employment of one Zimmerman. Bock was directed by Zimmerman, who was liable to do statute labour, to do as instructed by one Cassell, the pathmaster, and it is alleged while so engaged was injured. The jury found in answer to questions that the infant was not guilty of negligence and did not undertake to work in the gravel pit with knowledge of the danger, and did not voluntarily undertake the risk: that the defendants were guilty of negligence which consisted in the pathmaster allowing the boy to work in the gravel pit. The Judge below held that the pathmaster was a fellow servant with S. Bock, and defendants were not liable.

E. E. A. DuVernet, for plaintiffs.

A. Millar, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

FALCONBRIDGE, C.J.:—I do not think that under the circumstances the relationship of employer and employed existed between the township and the infant plaintiff. The latter was a servant in husbandry to John Zimmerman. He was not hired by the defendants; defendants had no power of dismissing him; he was not paid by defendants; and neither they nor their pathmaster gave him any particular order: *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Jones v. Liverpool*, 14 Q. B. D. 890; *Donovan v. Laing*, 94 L. T. Jour. 436.

The plaintiffs cannot therefore maintain this action under the Workmen's Compensation for Injuries Act, and they must rely on the other grounds set up in the statement of claim, and per contra the infant plaintiff, not being a workman of defendants, is not embarrassed or deprived of redress, if otherwise entitled thereto, by the application of the common law rule as to negligence of a fellow workman.

The infant plaintiff occupies the much higher position of one of the general public who has come upon premises which are defendants' property quoad this action, at defendants' invitation, on business in which they were concerned.

And for damage done to him either by the personal negligence of defendants or by the negligence of a servant acting within the scope of his employment, defendants are liable: *Thomas v. Quartemaine*, 18 Q. B. D. at p. 69; *Beven on Negligence*, 2nd ed., p. 532 et seq.

A municipal corporation may be liable in this capacity of property owner or of one having control of property: *Dillon*, 4th ed., sec. 985.

And a pathmaster is a servant for whose negligence in the course of his employment defendants would be liable: *Stalker v. Township of Dunwich*, 15 O. R. 342.

The answers of the jury find negligence on the part of defendants, and negative the question as to *volenti non fit injuria*, and find against negligence or contributory negligence of plaintiff. We are not favoured with a copy of the charge, but the evidence was no doubt placed before them fairly, and it was certainly placed before them in such a manner that defendants have not seen fit to complain thereof. The jury, therefore, considered the matter in all its bearings with regard to the warning and alleged warning to plaintiff and in other respects, and I do not think their findings ought to have been set aside.

The only difficulty that arises is on the answer to the 3rd question.

Having regard to the evidence and to what the learned Judge's charge must have been, the answer seems to me to be pregnant with the suggestion that the pit was dangerous and unfit for plaintiff to work in.

In this sense there is perhaps no particular cogency in the use of the word "boy" except to designate the infant plaintiff, as the jury knew that both he and his father were parties to the action.

But if the jury did mean to say that more care ought to have been adopted by the pathmaster in view of this plaintiff's tender years the value of the finding is not thereby impaired.

I think the appeal ought to be allowed and the verdict for \$125 restored with costs here and below.

Bowlby & Clement, Berlin, solicitors for plaintiff.

Millar & Sims, Berlin, solicitors for defendants.

BOYD, C.

JUNE 12TH, 1902.

TRIAL.

ANDERSON v. CHANDLER.

*Contract—Breach—Dismissal of Contractor—Architect's Notice of
—Time—Sunday.*

Action tried at Toronto, brought to recover damages for breach of contract for erection of a mausoleum and for work done and materials provided therefor.

G. T. Blackstock, K.C., W. R. Riddell, K.C., and A. Fasken, for plaintiff.

D. E. Thomson, K.C., and W. N. Tilley, for defendants Chandler.

H. L. Drayton, for defendant Gibson.

BOYD, C.:—The notice given to plaintiff by the architect under clause 25 of the conditions of the contract and mailed 23rd November, 1899, advising plaintiff that, unless he "proceeded satisfactorily with the work within 72 hours after mailing of the letter," the architect would certify the facts to the owner, was lacking in the element of specific objection, and does not indicate in what respect the work was to be prosecuted. The 23rd November, 1899, was a Thursday, and we have not the precise hour of mailing given; but in any event the last hour of the 72 would fall on Sunday. Should this *dies non* be counted against the contractor and in favour of a forfeiture? *Brown v. Johnson*, Car. & M. 444; *Sadler v. Barber*, 20 Wend. 207; *Wharton on Contracts*, vol. 2, sec. 897. There was unquestionably an application made on 27th November, if not before, and an attempt to remove undressed stones for the purpose of fitting them for the structure. But, apart from this, work of a substantial kind was being prosecuted in pursuance of the contract in the yard of the plaintiff, of which the architect took no notice, and of which he was not aware when he gave his notice and certificate; and therefore the stoppage of the work was not justifiable, and the plaintiff is entitled to \$650 in respect of it. Improper charges of fraud were made against the architect and not substantiated, and against him the action is dismissed with costs. Judgment for plaintiff without costs for \$650, with lien on the lot in question.

JUNE 12TH, 1902.

DIVISIONAL COURT.

PEGG v. HAMILTON.

Mortgage—Collateral Security—Promissory Notes—Payment.

Appeal by plaintiff from judgment of ROBERTSON, J., dismissing the action brought on a covenant to pay in a mortgage dated 20th October, 1888, given by defendants to plaintiff as collateral security for the payment of certain promissory notes.

C. C. Robinson, for plaintiff.

T. H. Lennox, Aurora, for defendants.

THE COURT (STREET, J., BRITTON, J.) held that the evidence established that the notes had been paid. Judgment below dismissing the action with costs and directing a discharge of the mortgage affirmed and appeal dismissed with costs.

JUNE 12TH, 1902.

DIVISIONAL COURT.

DAVIS v. HORD.

Costs—Taxation—Apportionment—Proper Method of—Slander Action—Issues—Failure of Some—Success of Others—Set-off.

Appeal by defendant from order of MEREDITH, C.J., dismissing defendant's application for order to review taxation of local Registrar at Stratford, and appeal from certificate of taxation of local Registrar, upon the ground that the principle upon which said taxation is based is wrong, i.e. that the taxing officer declined to allow defendant his full costs of the action under the judgment of the trial Judge. Action for slander, in which four separate claims are made for alleged slanders on different occasions. By the judgment the plaintiff recovered against the defendant in respect of the matters set forth in the third and fifth paragraphs of the statement of claim, the sum of \$1 and costs to be taxed; and the defendant recovered from the plaintiff in respect of the matters set forth in the fourth and sixth paragraphs of the statement of claim, his costs to be taxed. It was claimed for the plaintiff that he is entitled to the general costs of the action except so much of it as was occasioned by or referable to the causes of action upon which he has failed, with a set-off to the defendant of his costs of the issues upon which he has succeeded; while the defendant contends that the plaintiff should recover one-half only of the costs of the action against which he (the

defendant) is entitled to set off one-half his costs of defence. The taxing officer found in favour of the plaintiff's contention.

D. L. McCarthy, for defendant.

C. A. Moss, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held, following Sparrow v. Hill, 7 Q. B. D. 362, 8 Q. B. D. 479, that the taxing officer had adopted the proper mode of taxing the costs of the parties.

Appeal dismissed with costs.

Dent & Thompson, Mitchell, solicitors for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

JUNE 11TH, 1902.

DIVISIONAL COURT.

DECKER v. CLIFF.

Life Insurance—Assignment of Policy—Change of Beneficiary—Creditor.

G. M. Macdonnell, K.C., for defendant.

J. R. Roaf, for plaintiff.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., ante p. 354, dismissed with costs.

JUNE 11TH, 1902.

DIVISIONAL COURT.

BURKE v. BURKE.

Master and Servant—Liability of Master for Act of Servant—Trespass to Person—Unnecessary Force—Solicitor.

P. H. Bartlett, London, for plaintiff.

J. M. McEvoy, London, for defendants Burke and Cook.

J. Montgomery, for defendant Robinson.

Appeals by plaintiff and by defendants Burke and Cook from judgment of FERGUSON, J., ante p. 127, dismissed with costs.

JUNE 11TH, 1902

DIVISIONAL COURT.

SHARKEY v. WILLIAMS.

Sale of Goods—Conditional Sale—Hire Receipt—Removal for Non-payment.

P. H. Bartlett, London, for plaintiff.

J. C. Judd, London, for defendant.

Appeal by plaintiff from judgment of FERGUSON, J., ante p. 135, dismissed with costs.

JUNE 9TH, 1902.

DIVISIONAL COURT.

LONG v. EBY.

*Contract—Specific Performance—Delay—Time Essence of Contract
—Waiver.*

Appeal by the plaintiff from a judgment of MEREDITH, J., dismissing without costs an action for specific performance.

The plaintiff by a writing dated 30th January, 1901, offered to purchase certain town lots in Eglington for \$1,000, payable \$200 in cash to the vendors on acceptance of title, and the balance in instalments with interest at certain dates specified; deed to be given on payment of the \$200; and the remainder to be secured by mortgage, with the privilege of paying it at any time. The vendors were not to be required to furnish abstract of title or to produce any deeds or copies of deeds or papers not in their possession or control. The purchaser to be allowed ten days to examine title at his own expense. All objections to title to be made in writing within that time. If no objection be made within this time, purchaser should be deemed to have accepted the title. Sale to be completed on or before 15th February, 1901, on which date possession of the premises was to be given to him or he was to accept the present tenancies and to be entitled to rents. The contract was upon a printed form, and ended with the printed words, "Time shall be of the essence of this offer," but the following words were interpolated in writing immediately before them, "This offer good for one day."

The defendants signed an acceptance of the offer on the same day, and the plaintiff named Mr. Swayzie as the solicitor who would act for him.

On the 14th February, 1901, Mr. Vandervoort wrote to Mr. Swayzie as follows: "Mr. Faulkner tells me you are solicitor for Mr. Long, who has purchased certain property on Glen Grove avenue. The 15th is the last day for closing, and I would be glad to hear from you to-day if you are acting as Mr. Long's solicitor in this matter, and I will therefore send you the draft deed."

On the 15th February, 1901, Mr. Vandervoort, the solicitor for the defendants, wrote to Mr. Swayzie as follows: "I enclose draft deed of Glen Grove avenue property from the Eby-Blain Co., Limited, to your client John Long. Sale proceedings under charge No. 26750 were taken by the Eby-Blain Co., Limited, and the property put up by auction,

the sale proving abortive. I have the sale papers in my possession, and I think they are all regular. Without admitting any liability on our part to procure release from Emily Bonning Willoughby, our mortgagor, I propose endeavouring to get her to sign the deed, releasing any claim which she may have, but whether I will be successful in this direction I cannot at present say. Will you kindly let me have draft mortgage by return mail, also state a time at which it would be convenient to you and your client to close the purchase?"

No answer being received to this letter, Mr. Vandervoort on the 18th February, 1901, wrote as follows to Mr. Swayzie: "Re Glen Grove property. I beg to remind you that the last day for completing the purchase of the above property by Mr. Long expired on the 15th inst. While not desirous of calling the deal off, I must request you to close the same forthwith. Will you kindly revise and return draft transfer, also draft mortgage, your client to the Eby-Blain Co., and make an appointment with me to close the purchase."

Upon receiving this letter Mr. Swayzie went to see Mr. Vandervoort, and explained to him that he had been ill and had not been at his office, or the earlier letter would have been answered. He also stated that his client expected to receive money from England by 1st March, and wished an extension of time to that date in order that he might pay all the purchase money in cash.

On 20th February, 1901, Mr. Swayzie wrote to Mr. Vandervoort: "Referring to our conversation of yesterday, in which the closing of this matter was enlarged by mutual arrangement until the 1st March, to enable Mr. Long to pay the total amount of the purchase money in cash, I wish you would also let the settling of the conveyance stand a day or two, and I will revise and return it to you this week. I would like to glance over the title before doing so, and have been under the weather lately."

On the same day Mr. Vandervoort replied as follows: "I have your favour of the 20th instant. Under the agreement entered into between Mr. Long and my clients time is strictly the essence of the same, and in granting the extension until the 1st March I wish it distinctly understood that it is entirely without prejudice to our rights."

Nothing further happened until 2nd March, 1901, when Mr. Vandervoort wrote to Mr. Swayzie as follows: "I am instructed by the Eby-Blain Co., Limited, to advise you that the deal between them and your client Mr. John Long under agreement dated 30th January, 1901, is off, and that the said agreement is hereby rescinded."

To this Mr. Swayzie immediately replied that he had been ill, and only able to attend to the most urgent matters; he denied the vendors' right to rescind, and offered to carry out the contract at once, tendering the money and a conveyance. The vendors refused to proceed further with the matter, and the present action was brought on the 15th March, 1901, asking for specific performance of the contract.

* * * * *

S. H. Bradford, for plaintiff.

T. Mulvey, for defendants.

STREET, J. (after stating the facts as above):—There appears to be nothing in the nature of the property in question here which would justify us in holding that time must necessarily be treated as being of the essence of the contract between the parties, in the absence of a special provision to that effect.

The language of the plaintiff's offer to purchase, and of the clause relied on by the defendants as making time the essence of the contract, is so clumsy that I have had some difficulty in coming to the conclusion at which I have arrived, that the intention expressed in it is to make time of the essence of all the terms of the offer, and not merely of the period of one day allowed for its acceptance. Reading the words "time shall be the essence of this offer" most strongly against the plaintiff, who uses them, they may, I think, be fairly construed to mean, "time shall be the essence of the terms of this offer in case of its being accepted."

The letter of Mr. Vandervoort of the 15th February, 1901, seems to me, however, to contain the clearest possible intimation to the plaintiff's solicitor that the stipulation as to time being of the essence would not be insisted on. That was the day fixed for completion by the terms of the contract, but the writer merely asks the plaintiff's solicitor to let him have the draft mortgage by return mail and to state a time at which it would be convenient to the solicitor and his client to close the purchase. His letter, moreover, contemplates some efforts which he was to make to get a release from Mrs. Willoughby of any possible claim, and impliedly puts off the completion of the matter until the result of these efforts should be ascertained. The letter in effect says: "We are not quite sure that we have everything ready on our part yet, but fix a convenient time for yourselves to close the purchase, and no doubt we shall then be ready."

In my opinion, there was here an absolute waiver of the stipulation in the contract by which the defendants would have been entitled to rescind for non-completion on 15th

February, 1901, and no new date for completion was substituted. The plaintiff was then freed from the obligation of completing the contract on 15th February, 1901, and became subject to a new obligation to complete it within a reasonable time. The defendants, having waived their right to rescind the contract in case of non-completion on 15th February, 1901, were entitled only to insist that there should be no unreasonable delay; and in case the plaintiff should unreasonably delay the completion they might have given him a notice to complete within a reasonable time to be fixed by them or that they would treat the contract as rescinded. But such a notice could only be given after the plaintiff had been guilty of unreasonable delay, and could not be given in anticipation of such delay. The authorities upon this question are collected in *Green v. Seven*, 13 Ch. D. 599.

The notice relied on by the defendants as fixing a peremptory day for completion is the letter of Mr. Vandervoort to the plaintiff's solicitor of 20th February, 1901. That letter appears to have been written under the mistaken idea that the letter of 15th February, 1901, had not affected the defendants' right to insist upon a strict performance of the contract. It may, however, be treated as a notice to the plaintiff that if he failed to complete the matter by 1st March, the defendants would consider themselves at liberty to treat the contract as at an end. But the plaintiff down to the date of the letter had not been guilty of any unreasonable delay, and so there was no right in the defendants peremptorily to fix a new day for completion, and Mr. Vandervoort's letter of 20th February did not entitle the defendants to forfeit the contract on 1st March.

The defendants, therefore, in my opinion, were not justified in refusing to complete the contract when the plaintiff pressed for completion on 2nd March, and the plaintiff is entitled to succeed. The appeal should, in my opinion, be allowed with costs, and the plaintiff should have the usual judgment for specific performance, with costs to the trial inclusive. Further directions and subsequent costs reserved till after report.

BRITTON, J., referred as to waiver to *Harris v. Robinson*, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390; as to making time the essence of the agreement by notice, to *Green v. Seven*, 13 Ch. D. 589; as to delay after waiver, to *Macdonald v. Elder*, 1 Gr. 513, 526; as to reasonableness of notice and its terms, to *Compton v. Bagley*, [1892] 1 Ch. 313, *Reynolds v. Nelson*, *Meddows & Geldert's R.* 18,

Simons v. James, 1 Y. & C. 490: and agreed in allowing the appeal.

FALCONBRIDGE, C.J.:—The law is quite well settled, and I think this case must be treated as a decision on questions of fact arising upon the letters and conversations of the solicitors.

Such being the case, I see no reason for dissenting from the learned Judge's conclusion, and I would dismiss the appeal with costs.

Appeal allowed with costs; FALCONBRIDGE, C.J., dissenting.

B. E. Swayzie, Toronto, solicitor for plaintiff.

M. P. Vandervoort, Toronto, solicitor for defendants.

JUNE 13TH, 1902.

DIVISIONAL COURT.

McLAUGHLIN v. McLAUGHLIN.

Costs—Partition Proceeding—Taxed Costs—Special Circumstances.

W. A. Skeans, for adult defendants.

F. W. Harcourt, for infant defendants.

J. G. O'Donoghue, for plaintiffs.

Appeal by adult defendants from order of ROBERTSON, J., ante p. 378.

THE COURT (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) made an order directing that the costs of plaintiffs, of official guardian, and of adult defendants, as between party and party, be taxed and paid out of the estate of John McLaughlin, deceased, in lieu of commission, and dismissing the appeal without costs.

THE ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 21ST, 1902.)

VOL. I.

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No. 24.

BOYD, C.

JUNE 10TH, 1902.

TRIAL.

PATRIARCHE v. KAMMERER.

*Promissory Note—Presentment—Notice of Dishonour—Demand
Prior to Action—Power of Attorney—Bills of Exchange Act,
secs. 57, 85.*

Action for re-delivery of 70,000 shares of mining stock, subject to the payment by plaintiff of two promissory notes for \$400 and \$250 respectively, or for payment over of the proceeds of the sale of the shares, if sold, after payment of the amount of the notes. Counterclaim for payment of two notes of \$5,000 and \$300 respectively, made by the Electrical Maintenance and Construction Company, of which the plaintiff is manager, and for the delivery of 30,000 shares of mining stock in the same company, which had been delivered to the defendant with the 70,000 shares, but had been borrowed by the plaintiff from him afterwards. The notes were indorsed by the defendant by counterclaim, Frances M. Patriarche, wife of the plaintiff. The defendant claimed payment of the four notes less \$100 paid on account of the \$300 note. The defendant Frances M. Patriarche alleged that she had not due notice of dishonour of the notes for \$5,000 and \$300 respectively, and that they had not been duly presented for payment.

N. F. Paterson, K.C., for plaintiff.

G. T. Blackstock, K.C., for defendant.

BOYD, C.—I held at the hearing that the shares of the Blaine Company were held by the defendant in security for all that he owed, i.e., for the \$5,000 note, the \$400 note, and the \$250 note, mentioned in pleadings.

I find that the plaintiff and wife are both liable for the amount of the \$5,000 note payable on demand with interest

from 8th day of April, 1902. I do not give effect to the contention that they are or either of them is discharged from liability because it was not presented within a reasonable time. See Bills of Exchange Act, 1890, sec. 85. All the circumstances of the case repel the idea that any detriment has resulted from the delay; rather was it in ease of the indorsers that time should be given as a matter of grace till funds could be obtained from the works in construction at Orillia.

Judgment should be against them personally for the amount. I find, however, that the wife is discharged or is not liable as indorser on the other notes of \$400 and \$250. No evidence of presentment and notice of dishonour has been given as to these, and, apart from that, the power of attorney under which the husband signed his wife's name is not sufficiently comprehensive to embrace these notes. The context of the power of attorney shews that it was intended to give authority to indorse in connection with financial dealings and transactions with the Imperial Bank of Canada, and no connection has been established between that power of attorney and these notes or the said bank.

Judgment should be against the plaintiff alone on these last two notes, with interest on the \$400 note from 31st July, 1900, and with interest on the \$250 note from the 12th May, 1902, when the counterclaim was made.

As to this demand note, there is no evidence of any presentation to or of any demand prior to the action. (See Bills of Exchange Act, sec. 57.)

Judgment may be entered against the electrical company for the balance of \$200 on their note of 20th April, 1900, with interest from the date of payment of \$100 thereon (this precise time does not appear in the pleadings or evidence).

The defendant is entitled to enforce his lien by sale of the 70,000 shares in his hands of the Blaine stock, and is entitled to a declaration that the lien extends to the other 30,000 shares transferred to the plaintiff Patriarche on 17th June, 1901, and then agreed to be returned.

The plaintiff's action is dismissed with costs.

The defendant's counterclaim is allowed with costs against Patriarche; but as to his wife no costs for or from her.

N. F. Paterson, Toronto, solicitor for plaintiff.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, Toronto, solicitors for defendant.

FALCONBRIDGE, C.J.

JUNE 10TH, 1902.

WEEKLY COURT.

Re PADGET AND CURREN.

Will—Construction—Life Estate.

Motion under Vendor and Purchaser Act.

The question was as to the estate taken in certain land by James Charles Padget under the devise in the will of his father in the following terms:—

To my son James Charles all the south-east portion of aforesaid lot 15 in the 2nd concession Rideau front containing 125 acres, but excepting and reserving therefrom the one acre hereinafter reserved for my daughter Matilda McCaffrey, together with the east half of the rear 30 acres owned by me at the rear of lot 15 in the 3rd concession Rideau front, all in the said township of Gloucester, subject however to the following conditions and obligations, that is to say, that my son James Charles shall pay to his mother each year at such time or times as my said executors shall appoint, the sum of \$100 during her lifetime. That he, my said son James Charles, shall not and is hereby restricted from, at any time during his lifetime, selling, incumbering by way of mortgage or loan, or in any way raising money or money's worth on the said above described real estate, but he may farm-rent said farm property, and collect and enjoy said rent, provided in the event of my said son James Charles dying without leaving lawful heirs, the above described farm property shall become the property of my son Alexander, and in the event of his being married at the time of his death, but leaving no children, then and in such event my said son Alexander shall pay to the wife her dower value, but in the event of my son James Charles leaving issue, the above farm property shall pass to his children unclouded by conditions of title. My said son James Charles shall also be entitled to one-half share in barn hereinbefore mentioned, and the right of a roadway to and from said barn.

G. F. Henderson, Ottawa, for vendor.

J. Bishop, Ottawa, for purchaser.

W. J. Kidd, Ottawa, for executors and a devisee.

C. J. R. Bethune, Ottawa, for infants.

FALCONBRIDGE, C.J.—The interests of the infants would not be bound by any order on this motion, but, as the property in question is of small value, and treating the

motion as made under Rule 938, I think it is sufficiently clear that the testator's intention was to give James Charles an estate for life only, and thus prevent the application of the rule as to restraint on alienation where an estate in fee simple is given. No order as to costs, except that vendor pay costs of infants.

JUNE 16TH, 1902.

C. A.

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER
R. W. CO.

Leave to Appeal—Supreme Court of Canada—Contract—Construction of—Case not Involving Large Interests or Great Loss.

Motion by plaintiff for leave to appeal from judgment of Court of Appeal (1 O. W. R. 266).

The motion was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.

F. C. Cooke, for plaintiff.

A. W. Anglin, for defendants.

OSLER, J.A.—The question was simply one of construction of the contract between the parties and the ascertainment of the defendants' rights thereunder. On this point there was a difference of opinion, but none on the question whether the contract ought to be reformed—a point which was throughout decided adversely to the plaintiff.

That there was a difference of opinion is not of itself a reason for granting leave to appeal, certainly not where the question at issue is not one of large and general application—Fisher v. Fisher, 28 S. C. R. 494, and James v. Grand Trunk R. W. Co. (not reported), illustrates both aspects of this—or the action is not one involving large interests or great loss to the unsuccessful party.

Here, what is complained of does not involve any change in the appearance of the plaintiff's patented invention, and is an improvement on it from the defendants' point of view. And, whether an improvement or not, it belongs to and may be made use of by the plaintiff as part of his invention. There is no evidence that he suffers or is likely to suffer serious damage by what is complained of, and the action appears to have been brought more because of the plaintiff's objection to any change being introduced by the defendants in working his invention than for any other reason, unless, indeed, it were to enable him to get rid of his agreement altogether.

We think that no case is made out for granting leave to appeal further, and, therefore, that the motion must be dismissed.

MACLENNAN and MOSS, JJ.A., concurred.

ARMOUR, C.J.O., dissented.

BRITTON, J.

JUNE 21st, 1902.

CHAMBERS.

REX v. MARTIN.

Conviction—Keeping House of Ill-fame—Evidence.

Application by Kate Martin for order for issue of writ of habeas corpus and certiorari in aid. She was convicted of keeping a house of ill-fame, and committed to the Mercer Reformatory for six months at hard labour.

J. M. Godfrey, for defendant, contended that there was no evidence shewing her to be the keeper of a house of ill-fame, as charged in the information.

BRITTON, J.:—Upon the evidence, if the magistrate accepted it, he was at perfect liberty to make a valid conviction for an offence under the statute within his jurisdiction to try, and, therefore, there is no probable and reasonable ground for the defendant's complaint that she is unlawfully detained. Motion dismissed.

Robinette & Godfrey, Toronto, solicitors for defendant

BRITTON, J.

JUNE 21st, 1902.

CHAMBERS.

MURPHY v. BRODIE.

Stay of Proceedings—Consolidation of Actions—Parties—Jury Notice.

Appeal by defendant from order of local Judge at Sandwich dismissing application by defendant to stay proceedings in this action, or to consolidate it with another in which the same issues are involved, and from order granting plaintiff's motion to strike out jury notice.

Action to compel defendant to indemnify plaintiff for moneys expended by plaintiff as trustee for defendant and one Margaret Stuart upon a contract of indemnity made by the defendant. An action for account brought by Margaret Stuart against the plaintiff is pending, to which the present

defendant is not a party. After notice of trial for non-jury sittings given, defendant served jury notice and launched motion to consolidate or stay present action.

F. E. Hodgins, for defendant.

F. A. Anglin, for plaintiff.

BRITTON, J.—Appeal as to striking out jury notice dismissed.

Appeal as to order refusing to stay proceedings allowed, and order made postponing trial of this cause until after the sittings of the High Court of Justice to be holden at Sandwich on the 23rd instant, so as to permit the estate of Margaret Stuart to be represented, and to permit of the defendant herein being made a party in the suit of Stuart against the now plaintiff, as the plaintiff desires.

It seems to me quite clear upon the plaintiff's own shewing that if there is any liability on the part of the defendant in this action to the plaintiff, it is a liability as surety for the late Margaret Stuart in reference to hotel property, which property is in the control of plaintiff, and I think plaintiff cannot be prejudiced by this delay, so that an opportunity may be given to have the accounts of plaintiff investigated, and thus have the liability of defendant, and extent of that liability, determined.

Order as to costs varied and all costs of application to local Judge and of this appeal to be costs in the cause.

Leave to either party to make such further application as to consolidation or adding parties as they may deem necessary.

J. E. O'Connor, Windsor, solicitor for plaintiff.

Davis & Healy, Windsor, solicitors for defendant.

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JUNE 23RD, 1902.

DIVISIONAL COURT.

THOMPSON v. THOMPSON.

*Evidence—Corroboration—Action on Note by a Deceased Person—
Comparison of Signature with one on a Registered Mortgage.*

Appeal by defendants from judgment of County Court of Peel in favour of plaintiff in an action upon a promissory note purporting to be made by the deceased person whose executors and executrix are the defendants in the action. The signature to the note was denied upon the pleadings. The plaintiff, being called as a witness, swore that the deceased had signed the note. A mortgage, also purporting to be made by deceased, was produced, with the county registrar's certificate of its due registration indorsed, but no evidence was given of any comparison of the two signatures. A nonsuit, upon the ground that there was no sufficient corroboration of plaintiff's claim, was moved for, but refused. The main question was whether the Judge was entitled to look at the signature to the mortgage for the purpose of comparing it with that to the note, and determining whether the latter was a genuine signature.

B. F. Justin, Brampton, for defendants.

E. G. Graham, Brampton, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held that the Judge was entitled to make the comparison, and that plaintiff's evidence was sufficiently corroborated under R. S. O. ch. 73, sec. 10.

FALCONBRIDGE, C.J., referred to *Cobbett v. Kilminster*, 4 F. & F. 490; *King v. King*, 30 U. R. C. 26; *Thompson v. Bennett*, 22 C. P. at p. 406.

Appeal dismissed with costs.

MACMAHON, J.

JUNE 26TH, 1902.

CHAMBERS.

UNION BANK OF CANADA v. CUNNINGHAM.

Division Courts—Prohibition—Promissory Notes—Splitting Cause of Action—R. S. O. ch. 60, sec. 90 (1)—Omission by Judge to Take Down Evidence at Trial.

Motion by the defendant John Cunningham for an order prohibiting the plaintiffs from issuing execution from the 10th Division Court in the county of York, on a judgment recovered against him on the 12th June instant, for the amount of two promissory notes, one dated 1st April, 1901, payable in three months, for \$79.01, and the other, dated 4th June, 1901, payable in one month, for \$78.75, both notes being payable to the order of the defendants the Guelph Paving Company, at the Union Bank at Toronto.

J. G. O'Donoghue, for defendant.

D. W. Saunders, for plaintiffs.

MACMAHON, J.:—The defendant Cunningham resides at Guelph, and the other defendants carry on business there. Cunningham was personally served with a copy of the summons on the 14th May, under which he had twelve days to dispute the claim. On the 23rd May both defendants filed dispute notes, disputing the plaintiffs' claim and also the jurisdiction of the Court, claiming that the action should be tried at Guelph.

The amount being over \$100, and payable by the contracts of the parties at Toronto, the action was brought at Toronto as being within sec. 90 of the Division Courts Act, R. S. O. ch. 60.

The certificate of the clerk of the Division Court shews that two letters from Cunningham to the plaintiffs' solicitors, dated 3rd July and 5th July, 1901, were put in at the trial, in which he asks a renewal of one of the notes, and says he hopes to pay the other in the course of a week.

It was urged by Mr. O'Donoghue that, there being two notes, there are two contracts, and therefore the claim is not "a contract" exceeding \$100, and does not come within sec. 90, sub-sec. 1. There are two promissory notes, both by their terms payable in Toronto, and both may be sued in one action, and they form in the aggregate a sum exceeding \$100. By the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 24, "Words importing the singular number . . . shall include more persons, parties or things of the same kind than one . . . and the converse."

Brazill v. Johns, 24 O. R. 209, does not apply here, that case not being within sec. 86 (now sec. 90) of the Act, because the note sued upon was for \$99, and it was the interest alone which amounted to \$23, which brought the claim over \$100; and interest was not payable except as damages. There was not a contract to pay more than \$99. In the present case there are two sums of money which Cunningham contracted to pay in Toronto, which being added together exceed \$100, and therefore the case is within sec. 90, and the only way in which the defendant could have the place of trial changed was by an application to the Judge of the Court in Toronto on an affidavit containing the requirements prescribed by sub-sec. 4 of sec. 90.

The other point on which prohibition was moved was that the learned County Court Judge did not take down the evidence at the trial, as required by sec. 121.

The taking of the evidence is required for the purpose of appeal. And the omission to take the evidence would form no ground for prohibition. Nor would such omission invalidate the trial of the cause: *Bank of Montreal v. Statton*, 1 C. L. T. 66; *Sullivan v. Francis*, 18 A. R. 121.

The case is governed by *Hill v. Hicks*, 28 O. R. 390.

The motion must be refused with costs.

STREET, J.

JUNE 26TH, 1902.

WEEKLY COURT.

MACDONELL v. CITY OF TORONTO.

Assessment and Taxes—Local Improvement—"Owner"—"Taxable Person"—Petition—Two-Thirds in Number of Owners—One-Half in Value of Real Property Benefitted—Buildings—Land.

Special case. The plaintiff is the "owner," within sec. 668 of the Municipal Act, of a parcel of land in the city of Toronto, between Cecil and Baldwin streets. Nine persons, including plaintiff, are assessed as owners of property in the same block, fronting on Huron street, and "the city of Toronto" is on the roll in respect of two parcels in the same block, with the word "exempt" opposite the name. Six of the persons assessed as owners have petitioned the council for an asphalt pavement on Huron street between Cecil and Baldwin streets, as a local improvement under sec. 668 of the Municipal Act. The value of the lands and buildings of these six is, according to the roll, \$14,553, while that of the lands and buildings of the three others, including the plaintiff, is \$13,959, and the value of the vacant lots of the city is \$3,060.

A. B. Aylesworth, K.C., and C. A. Moss, for the plaintiff.

J. S. Fullerton, K.C., and T. Caswell, for defendants.

STREET, J., held that, under these circumstances, the petition has been signed by two-thirds in number of the owners and one-half in value of the real property to be benefited. As to the proportion of value, the buildings must be taken into account as well as the lands; and the city is not to be regarded as an owner within sec. 668, not being a "taxable person," and being improperly mentioned in the roll, and should not be counted in reckoning the number of owners or in ascertaining the proportion of value.

Judgment for defendants with costs.

BRITTON, J.

JUNE 18TH, 1902.

CHAMBERS.

RE CHAPMAN.

Will—Construction—Absolute Interest—Gift—Intestacy.

Motion under Rule 938 by the executors of the will of Parish Chapman, deceased, for an order declaring the true construction.

The will provided as follows: I give unto my sister-in-law Mary Ann Smith the sum of \$500, said sum to be deposited in a bank, and she is to draw the interest of said \$500 for her benefit during her natural life, and at her decease the said principal \$500 is to be given to her eldest son Edward Chapman Smith to be used for his benefit during his natural life. 2nd. I give unto my beloved wife Jané Chapman all which may remain after the disposition of the aforesaid \$500, consisting of all my real and personal property, consisting of my farm, including all implements, live and dead stock, all buildings and dwelling house, with all household furniture therein, useful and ornamental, also all moneys in bank or banks wherever they may be deposited, with the interest accruing thereto, and any and all mortgages and notes, with the interest thereon, that I hold or may hold at the time of my decease; and said executors hereinafter named shall immediately after my decease dispose of all the aforesaid property by sale and the proceeds or moneys arising from such sale shall safely be deposited where good security can be obtained and the interest of the same shall go to my beloved wife Jane Chapman for her sole benefit during her natural life. 3rd. And at the decease of my wife the portion given unto her shall be divided equally among the following persons: Albert Chapman, Parish Chapman, and George Chapman, sons of my brother John Chapman. John Cox, son of my sister Ann Cox, deceased, Ann Crosley, daughter of my sister

Eliza Jane Hookham, deceased ; Robert Watson, Reuben Watson, Jesse Watson, and Agnes Watson, sons and daughter of my sister Sarah Jane Watson; and William Chapman, son of my brother Charles Chapman, deceased. All to be for their benefit during their natural lives.

J. J. Maclaren, K.C., for the executors, stated that he had been unable to find authority in point.

N. W. Rowell, for David Porkess, executor under the will of Jane Chapman, widow of the testator, and for the said David Porkess personally, cited *Savage v. Tyers*, L. R. 7 Ch. 356.

F. W. Harcourt, for the infants.

BRITTON, J.—The testator made his will on the 12th August, 1887, and he died on the 17th October following.

In addition to the presumption against intestacy as to any portion of the testator's estate, there is internal evidence in the will itself that this testator intended then, and by that will, to dispose of all he had. I quite concede what was argued by Mr. Rowell, that a Judge ought not, because of any difficulty or embarrassment that would or possibly could arise from declaring intestacy as to the corpus or any part of the estate, to hesitate to so declare. It is for me, if possible, to ascertain from this will what was the intention of the testator. Lord Cottenham said in *Lassence v. Tierney*, 1 Macn. & G. 551, cited in *Hancock v. Watson*, [1902] A. C. 22, that if the terms of the gift are ambiguous, you must seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will.

The testator here gives \$500 to Ann Smith, but he limits the disposition of that so that in reality she gets for her own use absolutely only the interest upon it. At her death this \$500 “is to be given to her eldest son Edward Chapman Smith.” And this sum, not the interest alone, he can use “for his benefit during his natural life.”

Then the testator gives to his wife Jane Chapman all that remains after the \$500 is taken out, but he limits her for her own use absolutely to the interest only, and when the capital is no longer needed to earn interest for his wife he gives it all to the persons named, and *all* “for their benefit during their natural lives.”

I can come to no other conclusion than that the testator intended to make and did make a careful selection of those named from the possible claimants upon his bounty. He intended to dispose of all his estate. He knew of those relatives of his who, if not mentioned, could, in the event

of intestacy, claim, and I think he intended, and by his will carried out his intention, of disposing of all absolutely by a payment over of the \$500 after the death of Ann Smith and by a division of the rest after the death of Jane Chapman.

"A gift even of income to A. for life and then to B. indefinitely gives B. the absolute interest:" Clough v. Wynne, 2 Mad. 188; Theobald on Wills, 5th ed., p. 426. This seems to me a stronger case in favour of the persons named in the will.

The questions will be answered as follows:

(1) That portion of the corpus of the estate of Parish Chapman directed to be held by the executors in trust during the life of Jane Chapman is to be immediately divisible among the persons named in the 3rd paragraph of Parish Chapman's will and their representatives.

(2) Said persons and their representatives take an absolute interest in the said property.

(3) The sum of \$500 in the first paragraph of the will mentioned is an absolute gift to Edward Chapman Smith, and upon the death of his mother the said Edward Chapman Smith shall be entitled to said sum absolutely.

(4) The said testator did not die intestate as to any of his property or estate.

(5) Costs of all parties out of the estate.

BRITTON, J.

JUNE 27TH, 1902

CHAMBERS.

RE BURCH.

Will—Legacy—Period of Vesting—Direction to Distribute Estate—Discretion of Executors.

Application by the executors of the will of Peter Burch, under Rule 938, for an order declaring the construction of the will. The will was made on the 1st February, 1902, and the testator died on the 17th March following. Probate was granted to the executors. The clauses creating difficulty are the following: 2. "I give to my son John H. Burch \$2,500, and to my daughter Charity Heaslip, wife of Matthias Heaslip, \$2,500." 3. "It is my express will that no money so willed to my son John H. Burch shall be paid to him while his wife Addie Burch is living, and it is also my will that no money so willed to my daughter Charity Heaslip shall be paid to her while her husband Matthias Heaslip is living, unless through some misfortune they or either of them should become needy, when my executors

may pay them all, or such amounts as they may deem necessary for their comfortable support and maintenance." 8. "And it is also my will that all legacies mentioned in this my will shall be paid and satisfied not later than ten years after my decease, and it is especially my will that in case any dispute or disagreement arises between my legatees, or between my legatees and executors, such dispute shall be settled by arbitration in the usual way, without litigation in court of law." Apart from creditors and from donees of small specific bequests, the only persons interested in the estate are the two legatees above mentioned, and their brother Francis Oscar Burch, these three being residuary devisees. Francis Oscar was given \$2,500 without limitation as to time of payment. All interested are of full age and consent to be bound by the order to be made.

C. H. Pettit, Welland, for executors.

E. E. A. DuVernet, for legatee.

BRITTON, J., held, referring to *Re Wartmen*, 22 O. R. 601, and *Curtis v. Larkin*, 5 Beav. 155, that the gifts of \$2,500 each to John H. Burch and Charity Heaslip are immediate gifts to each, and are not made contingent by the testator's direction as to payment. The "vesting" was not suspended or postponed. Apart from the discretion given to the executors to pay in certain contingencies, they have the right to pay and should wind up the estate. The testator's direction to distribute the estate within ten years overrides the former expressed wish as to payment to the two legatees.

Order accordingly. Costs out of the estate.

German & Pettit, Welland, solicitors for executors.

Ingersoll & Kingstone, St. Catharines, solicitors for legatee.

JUNE 27TH, 1902.

DIVISIONAL COURT.

RE THURESSON, MACKENZIE v. THURESSON.

*Mortgage—Release of Part of Land with Right of Way by Mortgagee
—Effect of—Dedication—Release of Right of Way by Adjoining Owners.*

Appeal by Edith B. E. Thuresson from a certificate of the Master in Ordinary to the effect that the claimants S. M. Abercrombie and E. C. Laird have removed the cloud on the title created by the instruments referred to in a former decision, reported 3 O. L. R. 271, and ante p. 4, and are now entitled to prove their claims under the mortgage of 15th October, 1887. The claimants produced in

the Master's Office, in pursuance of the leave given them by the former order, releases to them of any claims to a right of way over any part of block A., except the portion of it lying immediately north of the easterly 40 feet of lot 1, north of Queen street and west of Sorauren avenue in the city of Toronto. The releases were executed by Amelia M. Cowan, Samuel Clare, B. McQuillan, and the executors of Edward Hickson's will. The appellant is one of the persons interested in the estate of Eyre Thuresson. She gave evidence to shew that by reason of an alleged dedication by the owner of the equity of redemption to the public, and of user by the public, the whole of block A. had become and remained a public highway at the time of the part discharge executed by Samuel Clare, who then owned the mortgage in question, to the executors of Hickson, on 20th January, 1893, mentioned in the former decision; and that it has ever since been and still is a public highway.

J. D. Montgomery, for appellant. By reason of this part discharge, the rights of the public have intervened, and are no longer subject to the mortgage, and these rights cannot be taken away from the public and restored to the mortgagee by any act of any private person.

R. U. McPherson and J. E. Jones, for respective mortgagees.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the effect of the instruments produced would be to vest in the present mortgagee, Miss Abercrombie, the rights which had been improperly released by Clare, under which she claimed to be entitled to prove; and the Master was right in holding that these instruments removed the cloud on the title created by the part discharge, and that they are entitled to prove under the mortgage. Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

MCCREADY v. GANANOQUE WATER POWER CO.

Waters and Watercourses—Dam—Diversion of Waters—Riparian Proprietor—Order of Judge under R. S. O. 1877 ch. 114 (R. S. O. 1897 ch. 141)—Notice.

Appeal by defendants from judgment of LOUNT, J. Action for injunction restraining defendants, the owners of a water-power at the town of Gananoque, fed by Wiltsie creek and Gananoque river, from opening their dam and letting water flow down on plaintiffs' lands, and for damages. Up to 1900 defendants compensated plaintiffs for

damages suffered by them, but have refused to allow any compensation for the year 1900, and set up that the damage alleged to have been sustained is the result of the situation of plaintiffs' land, and that any payments made to present plaintiffs, or other riparian proprietors, were made for the sake of peace, and not intended as admission of any liability to pay same. The trial Judge held that defendants had not the right to cause water to flow on plaintiffs' lands other than the natural flow of Wiltsie creek, or to so control or manage the dam or outlet of Charleston lake as to cast more than the natural flow of water upon plaintiffs' lands, and granted a perpetual injunction, and awarded damages to plaintiffs.

G. H. Watson, K.C., for defendants.

R. T. Walkem, K.C., for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.—By the order of the Judge of the County Court of Leeds and Grenville, made in 1886, under R. S. O. 1877 ch. 114 (R. S. O. 1897 ch. 141), without notice to plaintiffs, the defendants were given permission to build a dam at Charleston lake outlet, the top of which shall be four feet above the level of an old dam. Fearing a flood, in June, 1900, the defendants opened the dam gates, and removed several of the top logs, and released a quantity of water into Wiltsie creek, which overflowed on plaintiffs' lands. The defendants, in my opinion, were not justified in doing this under the order of the Judge. The plaintiffs were not parties to the proceedings upon which the order was obtained, and the defendants had no right whatever to cause a discharge of the water into the creek to the injury of plaintiffs. The damages were properly assessed, but there is no evidence to shew that the trespass will be continued or was done maliciously, and an injunction is not necessary: *Ellis v. Clemens*, 21 O. R. p. 231-2.

Appeal allowed as to injunction; otherwise dismissed with costs.

Walkem & Walkem, Kingston, solicitors for plaintiffs.

E. H. Britton, Kingston, solicitor for defendants.

JUNE 28TH, 1902.

C. A.

McGARR v. TOWN OF PRESCOTT.

Municipal Corporation—Highway—Non-repair—Sidewalk—Damages.

Appeal by defendants from judgment of FERGUSON J., ante p. 53.

J. B. Clarke, K.C., for defendants.

J. A. Hutcheson, Brockville, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J. A. (after agreeing with the trial Judge in all his findings):—I cannot avoid thinking that the amount at which the damages have been assessed is too liberal an allowance, considering the nature of the injuries—a sprained ankle and an affection of the sciatic nerve—no doubt, a severe and painful one, arising some time after the accident, and attributed, whether rightly or wrongly, to it, but from the effect of which the plaintiff may expect to recover at no very distant time. Taking everything into consideration, an award of \$900 would more nearly meet the justice of the case.

Judgment reduced to \$900, and appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Municipal Corporation—Highway—Non-repair—Accident to Foot Passenger—Negligence.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiff, in action tried at Toronto, brought by the widow and administratrix of Levi Gaby, late of Richmond Hill, deceased, to recover damages for injuries which caused his death. The trial Judge found, after a lengthy review of the evidence, that deceased left the Commercial Hotel, in Jarvis street, in the city of Toronto, on 19th November, 1900, at 8.30 p.m., in a sober condition, and that his body was found between 7 and 8 o'clock the next morning in a hole, 4 1-2 feet wide and nearly 8 feet deep, dug three weeks before by the contractor for masonry work of the new St. Lawrence market, added as third party; that the hole was not properly guarded, and was 16 feet from the building wall, and on the west side of Jarvis street, and deceased fell into it; and that, under his contract with the defendants, the third party, James Crang, was liable to them.

A. F. Lobb and W. C. Chisholm, for defendants.

T. H. Lennox, Aurora, and S. B. Woods, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—We are satisfied that there was abundant evidence of negligence, for which the city is responsible, in

the condition of the highway; and the death of the plaintiff's husband has been properly attributed to, and was the direct and well-proved result of, such negligence. We agree, too, that the attempt to fasten contributory negligence upon the deceased entirely fails.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

RE TORONTO RAILWAY CO. AND CITY OF TORONTO.

Assessment and Taxes—Street Railway—Trolley Cars—Real Estate.

Appeal by the Toronto Railway Company from the judgment of a board of County Judges (McDOUGALL, MCGIBBON, and MCCRIMMON, JJ.) under the Assessment Act, holding that trolley cars of the company are assessable as part of or attached to the real estate of the company, the principle of *Bank of Montreal v. Kirkpatrick*, 2 O. L. R. 113, being applied.

J. Bicknell, K.C., for the appellants.

J. S. Fullerton, K.C.; and A. F. Lobb, for the city corporation.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A., affirming the judgment below, upon the application of the principle laid down in the case cited.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

CUSHEN v. CITY OF HAMILTON.

Municipal Corporation—Invalid By-law—Payment of Money Under—Recovery from Corporation.

Appeal by defendants from judgment of ROSE, J., in favour of plaintiff, in action tried at Hamilton, brought to recover certain money paid to defendants in 1896 and 1897, under the provisions of a by-law requiring vendors of certain meats in quantities of less than a carcass to take out a license. The by-law was declared invalid in October, 1898, upon return of an order nisi to quash a conviction of plaintiff under it: *Reg. v. Cushen*, not reported. The trial Judge held, on the facts, that the payment made by plaintiff was not voluntary: *Morgan v. Palmer*, 2 B. & C. 729; that it was not necessary to quash the by-law before bringing the action, and not being an action of tort, no notice was necessary: *Mallot v. Mersea*, 9 O. R. 611; that the claims assigned

to plaintiff were assignable, and notice in writing under the Judicature Act of the assignment (sec. 58, sub-sec. 5) was not necessary between the parties; and that plaintiff was entitled to recover.

F. Mackelcan, K.C., and J. L. Counsell, Hamilton, for defendants.

W. R. Riddell, K.C., and J. G. Gauld, Hamilton, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

OSLER, J.A.:—The by-law itself has not been quashed or set aside. In the case of some of these payments there was no evidence of the circumstances under which they were made, and, as to others, it appeared that they were so paid to avoid a threatened prosecution for breach of the by-law. Two of the witnesses spoke of a statement made to them by the market inspector or other city official that they could not be allowed to stand in the market unless a license was taken out, but it was clear that there was neither power nor attempt to enforce such a threat, and the proper inference is that, if made at all, it was stated only as a result which would follow a prosecution and conviction for a breach of the by-law. Under these circumstances, I am of opinion that the action does not lie: Pollock on Contracts, 6th ed., p. 579; *Brisbane v. Dacres*, 5 Taunt. 143.

Parker v. G. W. R. Co., 7 M. & G. 253, *Steele v. Williams*, 8 Exch., *Hooper v. Mayor of Exeter*, 56 L. J. Q. B. 457, *Kennedy v. Macdonell*, 1 O. L. R. 250, bear no analogy to the case at bar.

See *May v. Cincinnati*, 1 Ohio St. R. 268; *Robinson v. Charleston*, 2 Rich. S. C. Com. Law 317; *Radich v. Hutchins*, 5 Otto 210, per Field, J.; *Mayor of Baltimore v. Hefernan*, 4 Gill (Md.) 425.

The point is that defendants had no power to enforce the by-law except by resorting to judicial proceedings of some kind, in which it was open to plaintiff to resist his liability as effectually as if he were being-sued for a debt.

Appeal allowed with costs, and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

FISHER v. FISHER.

Gift—Parent and Child—Business Relationship between—Undue Influence—Onus of Proof.

Appeal by defendants Frederick and Charles Fisher

from judgment of FALCONBRIDGE, C.J., in favour of plaintiff, in action to set aside two discharges of mortgages, and for other relief. G. T. Fisher, the father of the appellants, died on 15th September, 1899, and clause 5 of his will, bearing date 7th May, 1895, directed that the indebtedness to him, at the time of his decease, of any child, should be deducted from the portion devised to such child. On 23rd April, 1898, the appellants, in the presence of R. T. Banting, a conveyancer, who had for years done the greater part of G. T. Fisher's business, procured their father to execute discharges of two mortgages they had given him in 1893. The plaintiffs and defendant Catharine Fisher are the executors of G. T. Fisher. The Chief Justice held that the appellants had not satisfied the onus of proving that a gift obtained under the circumstances here shewn was the spontaneous offering of a free and unbiassed mind.

E. F. B. Johnston, K.C., and W. A. Boys, Barrie, for defendants.

W. A. J. Bell, Alliston, and W. G. Fisher, Alliston, for plaintiffs.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

MOSS, J.A. (after reviewing the circumstances at length):—I am unable to discover in the evidence proof or the existence of such a relationship of trust and confidence, or of such assumption by the appellants of the management of the business affairs and property of the deceased, as to cast upon them the burden of proving that they had not abused their position, and that the execution of the discharges had not been brought about by any undue influence on their part. . . . Hopkins v. Hopkins, 27 A. R. 658, is not applicable. It was distinctly a case of duress.

Appeal allowed with costs. and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

RE TORONTO PUBLIC SCHOOL BOARD AND CITY OF TORONTO.

Public Schools—Expenditure—Annual Estimates—Powers and Duties of Municipal Council and of School Board.

Appeal by the city corporation from the order of a Divisional Court (2 O. L. R. 727) varying an order of STREET, J., in Chambers, upon an application by the school board for a mandamus to the city corporation to levy certain sums of money alleged by the school board to be re-

quired for school purposes for the year 1901, and granting such application in respect of most of the items of expenditure estimated by the applicants. The principal points decided by the Divisional Court were that it is only when it is made to appear that the expenditure would be clearly an illegal one, or *ultra vires* the school board, that the council is justified in refusing to raise the sum required by the board; and that all that the council has a right to ask is that an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and when that has been done, the duty is imposed upon the council of raising by taxation the sums required according to the estimate.

J. S. Fullerton, K.C., and A. F. Lobb, for appellants.

F. E. Hodgins, K.C., for respondents.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A., BRITTON, J.) was delivered by

OSLER, J.A., adopting substantially the reasons of MEREDITH, C.J., in the Court below.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

COUNSELL v. LIVINGSTON.

Promissory Note—Notice of Dishonour—Sufficiency of—Husband and Wife Indorsers—Agency of Husband—Notice to Husband.

Appeal by defendants W. C. Livingston and C. E. Livingston from judgment of FALCONBRIDGE, C.J., (2 O. L. R. 582), in action by executrix of C. M. Counsell, deceased, to recover \$3,500, amount of a promissory note, of which appellants are indorsers, and which was one of a series of renewals of a note given under an agreement by which the note was to be renewed within five days from the expiration of every three months from its date for four years. The plaintiff alleges that a notice was posted to W. C. Livingston the day after maturity in the following words:—"I beg to advise you that Mr. L.'s note for \$3,500 in your favour, and indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand?" The Chief Justice held that the notice was sufficient

to the indorser to whom it was addressed, and also to his wife, as he was her agent.

A. B. Aylesworth, K.C., for appellants.

E. Martin, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

GARROW, J.A.:—I think the evidence amply sufficient to sustain the finding that the husband was the wife's agent to receive the notice. The husband admitted that his wife was cognizant of the transaction, and that he was looking after the business part of it, and she admitted that she kept no track of the notes, but left the matter entirely in his hands, and had no personal knowledge of the matter. By the Bills of Exchange Act, notice may be given to an agent and may be verbal, and a verbal notice to an agent who happened also to be an indorser would not require to be repeated. . . . I agree with the finding that the notice was sufficient in point of form. . . . I do not see how this case can be distinguished from *Paul v. Joel*, 3 H. & N. 455, 4 H. & N. 355. The notice here does not precisely say that the note is unpaid, but it must be remembered that it is one of a series intended to run, if necessary, for four years, with renewals every three months, and the four years has not expired, and the information given that the note was due and the request to send renewal and expenses was a notice that the note was unpaid, and that payment in one way or another was requested, which seems to be all that is required.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

GRAY v. McMATH.

Landlord and Tenant—Covenant for Renewal of Lease—Arbitration or Valuation—Waiver of Irregularities—Acquiescence of Landlord.

Appeal by defendant from judgment of MEREDITH, J., in action to compel defendant to execute and deliver to plaintiff a lease for five years of certain premises on the north side of Queen street, in the city of Toronto, occupied by him as a drug store and dwelling, and for damages for breach of covenant to renew.

J. K. Kerr, K.C., and W. Davidson, for defendant.

F. Denton, K.C., and H. C. Dunn, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

GARROW, J.A.:—The agreement for renewal is contained in an indenture of lease, dated 14th April, 1896, whereby

the defendant demises the said premises to the plaintiff and one Buck for a term of five years, and is in the words following:—

“ And it is hereby further covenanted and agreed by and between the said lessor and the said lessees that at the expiration of the term hereby granted, he the said lessor shall and will grant to the said lessees a new and further lease of the said premises thereby demised, including said stable, if the said lessees shall have elected to lease said stable as hereinbefore provided, for a further term of five years, with like covenants as are herein contained, excepting this covenant for renewal and also the covenant immediately preceding this covenant, relating to stable, at a rent to be fixed by arbitration as hereinafter provided, and payable as herein reserved. And it is hereby further covenanted and agreed between the said lessor and the said lessees that the amount of such rent shall be settled by the award of three indifferent parties, or of the majority of them, one to be named by the lessor, another by the lessees at least one month before the expiration of the term hereby granted, and the two thus chosen shall at once select a third, and their award, or the award of a majority of them, shall be made before the expiration of the then existing term. Provided that the expense of the said arbitration shall be borne equally between the parties hereto, but the said new lease shall be prepared by and at the expense of the said lessor.”

The learned Judge held that arbitration in the strict sense was not what the parties intended by the agreement before set out, that what was wanted was in the nature of a mere valuation, and not a settlement of pending disputes, and that whether it was valuation or arbitration the defendant's own conduct precluded him from succeeding in his defence.

I agree with the learned Judge's conclusions on both grounds.

As to the first, from the language of the agreement before quoted and the nature of the subject-matter, it appears to me that what the parties intended to provide for was in the nature of a valuation rather than of an arbitration in the strict sense. The new lease was only to be for five years. The old rental was only \$40 per month. The agreement makes no provision for calling witnesses, and neither of the parties, although aware that the proceedings were in progress, offered to produce or did produce witnesses or argued that witnesses should be called. An arbitration is usually an expensive proceeding, and the parties who, by

the agreement, were to bear the expense of fixing the new rent equally, may very well, and I think may wisely, have considered that their neighbours were as capable of fixing this rent as the usual crowd of experts called and sworn at great expense.

In my opinion the case falls within the principle of such cases as *Re Cairns, Wilson & Green*, 18 Q. B. D. 7; *Re Hammond and Waterton*, 62 L. T. N. S. 808.

But whether it was valuation or arbitration, it is, I think, clear that the defendant was fully aware of the alleged irregularities of which he now complains, and that he waived them and acquiesced in the course of procedure laid down and adopted by the board at their first meeting, and having taken the chance of the award being in his favour, cannot now be heard to complain: *Hewlett v. Laycock*, 2 C. & P. 547; *Bignall v. Gale*, 2 M. & G. 830; *Moseley v. Simpson*, L. R. 14 Eq. at p. 236.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

TAYLOR v. G. T. R. CO.

Railways—Passenger—Special Contract—Return Ticket Signed by Passenger—Failure by him to Conform to Conditions.

Appeal by plaintiff from judgment of Lount, J., dismissing with costs action for damages. The jury found \$500 damages for the plaintiff. On 13th February, 1901, the plaintiff bought from the C. P. R. Co. a return ticket, good for three months, at reduced fare, from Indian Head to Toronto. Clauses 5 and 7 of the printed conditions were as follows: 5th. "That this ticket must be signed by the passenger in ink, and if presented by any other than the original purchaser, whose signature is hereon, the conductor will take it up and collect the fare. The purchaser will write his or her signature when requested to do so by the conductor or agents." 7th. "That it will not be good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the G. T. R. system at Toronto in sufficient time to permit of return trip and arrival at original starting point on or before ———, and unless officially signed and dated in ink and duly stamped by said agent." The plaintiff deposed that, pursuant to one of the other conditions on the ticket, he signed it when he bought it in the presence of the C. P. R. ticket agent, but nothing further was said.

and that he (plaintiff) had never afterwards read the conditions nor complied with the 7th. Upon concluding his business in Toronto he presented the ticket at the G. T. R. Co.'s office, and procured a sleeping-car berth; that he then had his baggage checked, and then passed through the gate to the track the train stood on; in each case the official punching his ticket without objecting to the non-compliance with the 7th condition. The conductor of the train, however, put the plaintiff off the train at Thornhill, using violence, he alleges. The trial Judge submitted to the jury only the question of damages, and they found \$500. It was contended that it should have been left to the jury to find whether the plaintiff knew of the 7th condition, whether he knew that he was travelling at a reduced rate, and also whether the defendants did what was reasonable and sufficient to give the plaintiff notice of such conditions; relying on *Bate v. C. P. R. Co.*, 14 O. R. 625, 15 A. R. 386, 18 S. C. R. 697; *Richardson v. Roundtree*, [1894] A. C. 217; *Harris v. G. N. R. Co.*, 1 Q. B. D. at p. 532; and whether the condition had been waived; and further whether the plaintiff had offered sufficient and reasonable compliance with the condition by proving identification under condition 5, which must be taken as in substitution for condition 7, after a passenger has once been invited to enter a car by any official whose duty it is to examine a ticket. The 7th condition, it was also contended, is unreasonable and contrary to the policy of the law, and is inconsistent with R. S. C. ch. 110, sec. 10.

H. T. Beck, for plaintiff.

W. Cassels, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS. GARROW, J.J.A.) was delivered by

MACLENNAN, J.A.:—The plaintiff is a business man, and signed the contract on the ticket agreeing to its provisions, but he says he did not read the 5th or 7th or any of the clauses printed, and therefore is not bound by them, and he relies on *Bate v. C. P. R. Co.*, 15 A. R. 625, 18 S. C. R. 697; *Henderson v. Stevenson*, L. R. 2 Sc. App. 470; *Parker v. S. E. R. Co.*, 2 C. P. D. 416; and *Richardson v. Roundtree*, [1894] A. C. 217. The present case is, however, different from those cited. The ground of the decision in the *Bates* case is explained by the Chief Justice in *Robertson v. C. P. R. Co.*, 24 S. C. R. 617. In the present case the plaintiff was not asking for a ticket for an ordinary single journey, but for a special contract, viz., a return

journey, which it was entirely optional with the company to grant. That being so, there was nothing to put him off his guard, and when he was asked to sign the document which he received and paid for, I think he was as much bound by its terms whether he read it or not as in the case of any other business transaction. But for the contract he had no right to travel upon the defendants' railway at all, and in order to exercise that right he was bound to conform to the condition on which it was granted and to which he had assented by his signature.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

PURDY v. PURDY.

Will—Undue Influence—Mental Capacity—Preferring One Son to Others—Onus of Proof.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing with costs action to restrain defendants Purdy, Sutherland, and Brown, the executors named in the will of Emeline Purdy, deceased, from obtaining probate of the will, and for a declaration that the will was not the true will of deceased, because she lacked testamentary capacity, and because, it is alleged, undue influence had been exercised by the defendant Purdy, one of her sons. The trial Judge held that the testatrix, 72 years of age, was perfectly capable of making her will, and had made it known, previous to doing so, that she intended to leave her money to her son Philip, who resided on the same farm, but not in the same house with her, until shortly before her death. Her other children lived in different parts of Canada and the U. S. A.

G. F. Shepley, K.C., and E. S. Smith, K.C., for plaintiffs.

T. G. Meredith, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

GARROW, J., who, reviewing the evidence at length, held that Philip did not procure the will to be made in his favour, and therefore there was no onus of proof for him to satisfy, but that, if there was, he had satisfied it; that his conduct was perfectly righteous; and that there was not

a single circumstance against him except that he took a larger share of the estate than the others; and that the testatrix was of sound mind, and deliberately, voluntarily, and intentionally made the will in question.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

BOWMAN v. IMPERIAL COTTON CO.

Master and Servant—Injury to Servant—Negligence of Foreman of Master—Evidence of, Sufficient for Jury's Finding.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., upon the findings of a jury, in favour of plaintiff for \$100 in an action for damages for injuries sustained by plaintiff, acting under the orders of defendants' foreman, and while engaged in tightening an arch in their factory in the city of Hamilton. The wrench plaintiff was using slipped and his arm was caught and crushed in a 12-inch belt, which was unprotected and in motion. The jury found that the plaintiff had not been negligent, and that defendants had; that the machinery was defectively guarded and improperly started while plaintiff was working; and they assessed the damages at \$100. The Chief Justice gave costs on County Court scale without set-off.

J. J. Scott, K.C., for defendants. The plaintiff was, upon the evidence, guilty of negligence. The Factories Act, R. S. O. ch. 256, does not apply, because the plaintiff came within sec. 27, which does not give the benefit of the Act to a workman at work only in repairing.

W. A. Logie, Hamilton, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

MOSS, J.A.—The sole question in this case is whether the injury to plaintiff was due to negligence for which the defendants are responsible. . . . (after reviewing the evidence):—Upon the whole case I find it impossible to say that there was not evidence upon which a jury might reasonably conclude that the injury was caused by the negligence of the defendants' foreman or overseer, to whose orders the plain-

tiff was bound to conform and did conform in doing the work in the course of which he received the injury.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

McCULLOUGH v. HULL.

Solicitor and Client—Solicitor Agent—Disclosure of Agency—Commission.

Appeal by defendant from judgment of MACMAHON, J., allowing plaintiff's claim of \$1,000 for commission on sale of certain timber, at \$500.

E. E. A. DuVernet and J. A. Ferguson, for defendant. There was no contract for commission, and, if any, the contract has been abandoned. In any event, the plaintiff, being the solicitor for both parties to the transaction, is not entitled to recover a commission.

E. F. B. Johnston, K.C., and J. W. McCullough, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.—The plaintiff is a solicitor, and on the evidence I would hold that his brother-in-law, Mr. Jackson, was his client, and that, therefore, if he had succeeded in proving the case set forth in his statement of claim, he must in law have failed: *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549: and it would, I think, make no difference that the plaintiff, after making the contract with defendant, informed his client of it: *Holden v. Webber*, 29 Beav. 117.

But I think the proper conclusion upon the evidence is that the plaintiff in preparing the agreement acted as the solicitor of Mr. Jackson, as he had acted throughout the matter whenever a solicitor's services were required, and not as the agent of the defendant, which agency he voluntarily abandoned on the 15th October, thus surrendering, in my opinion, the right to claim the commission for which he now sues.

Appeal allowed with costs and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

FULLER v. GRANT.

Evidence—Corroboration—Partition.

Appeal by defendant from judgment of LOUNT, J., directing partition or sale of the land in question. David Dunham, deceased, devised the land in question to his daughter Emma Dunham for life with remainder to her children, and a memorial of his will was registered in 1857. Emma Dunham died in 1891. F. Sessions, one of the two children of Emma Dunham, conveyed his share in 1896 to defendant. The plaintiff claims under a conveyance made to him in 1898 by Flora Haight, alleged to be the other child of Emma Dunham. The trial Judge held that the evidence of Flora Haight that she was a daughter of Emma Dunham, and half-sister to F. Sessions, was true and sufficiently corroborated, and that plaintiff was therefore entitled to a one-half interest in the land.

J. A. Robinson, St. Thomas, for defendant.

W. R. Riddell, K.C., and J. Cowan, Sarnia, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

MOSS J.A.:— . . . I think the finding below is well supported by the evidence. . . . The appeal should be dismissed with costs.

JUNE 28TH, 1902.

C. A.

REX v. SCULLY.

Evidence—Malicious Prosecution—Record of Acquittal—Fiat of Attorney-General not Necessary—Mandamus—Clerk of Peace.

Appeal by Attorney-General for Ontario from order of a Divisional Court (2 O. L. R. 315) reversing order of FALCONBRIDGE, C.J., dismissing a motion for a prerogative writ of mandamus directed to the clerk of the peace for the county of Perth, commanding him to deliver to the applicant, the plaintiff in an action of Scully v. Peters, a record of the proceedings in the case of Regina v. Cornelius Scully, tried at the Court of General Sessions of the Peace

at the city of Stratford, and to make and deliver a certified copy of the indictment and indorsements or to produce the originals at the trial of the said action. One Louis Peters laid an information against the said Cornelius Scully for stealing 41 saw logs, the property of said Peters. Scully was indicted and tried at the Sessions, and the presiding Judge indorsed the indictment: "Withdraw the case from the jury—no case—discharge the prisoner." Scully then commenced his action for malicious prosecution, and desires the indictment as indorsed or a certified copy for use at the trial.

J. R. Cartwright, K.C., and Frank Ford, for Attorney-General for Ontario.

F. Arnoldi, K.C., for defendant.

ARMOUR, C.J.—(after reviewing the authorities):—The rule that a person acquitted of felony shall not have a copy of the record of acquittal for the purpose of being used in an action for malicious prosecution without an order of the Court or the consent of the Attorney-General, has always been in force in this Province and was maintained in *Regina v. Ivey*, 24 C. P. 78, and in *Hewitt v. Cane*, 26 O. R. 133, and I do not think that it should now be abrogated by judicial decision, but that it should be left to the Legislature to do so if it sees fit. The necessity for the rule is, at present, at least as great as it ever was, and if abrogated some other safeguard against unfounded actions for malicious prosecution ought to be substituted for it.

OSLER, J.A.—(after reviewing the authorities):—It is foreign to the general principles of our law that the right of one subject to pursue a civil remedy against another shall depend upon the permission of an official of the Crown, of however exalted a character; for if he may refuse to allow him to procure the evidence without which his action cannot be successfully prosecuted, he does, in effect, refuse to allow him to maintain the action at all. A practice, moreover, which concedes the right to a copy of the record of acquittal on an indictment for a misdemeanour, but denies it except by permission of the Attorney-General in the case of an indictment for felony, is anomalous and wanting in principle. . . . The learned Attorney-General has informed the Court that he has communicated with the law officers of the Crown in England as to the state of the practice there on the subject. He appears to have the authority of the present and former Attorney-General for saying that the practice which was supposed to be established here by

Regina v. Ivey, 24 C. P. 78, and which is now insisted on by the appellant, is quite obsolete in England; that the Attorney-General's fiat is not deemed necessary; and that no obstacle whatever is placed in the plaintiff's way in obtaining the evidence of the termination of the proceedings against him. The practice of the Attorney-General holding, as it were, an inquiry as to the existence or absence of reasonable and probable cause is unheard of.

MOSS, J.A.—(after reviewing the authorities):—Reading the cases, English and Canadian, touching the question, I do not find that any fixed rule has been settled by judicial authority. In the present state of the authorities, I think we are at liberty in this Court to place our own construction upon the 46 Edw. III., which is undoubtedly in force in this Province, and to say whether the exercise of the rights thereby conferred are subject to the restriction sought to be placed upon them where a record of acquittal in a case of felony is sought for the purpose of being used as evidence in an action for malicious prosecution. In view of the many opinions which have been expressed, I venture mine with diffidence. On the whole, my conclusion is in favour of upholding the judgment appealed from.

I am not able to place upon the comprehensive language of the 46 Edw. III. the restricted meaning which has been contended for. It appears to me to apply to all judicial records, as well criminal as civil, and to give the subject access to them for his necessary use and benefit, which was, and is, the law of England. To my mind the declaration of Willes, C.J., in *Rex v. Brangan*, 1 Leach 27, that by the laws of the realm every prisoner upon his acquittal had an undoubted right to a copy of record of such acquittal, is a plain declaration of the meaning of the ancient statute.

I venture to think that the practice of requiring a fiat is not in accord with the true spirit and meaning of the law as declared in the statute; is not even supported by the Old Bailey Order, which, as before pointed out, did not extend the restriction beyond the time when the Court was actually in session, and is not adapted to modern conditions. The law gives a right of action for malicious prosecution, and if it is desirable to place restrictions upon the general right of a person who has been acquitted of a criminal charge to maintain such an action, the Legislature can so declare. In it resides the power to provide safeguards against frivolous or vexatious actions, if any safeguards are deemed necessary. Possibly if the trial of such actions were committed to Judges alone, no further safeguard would be required.

I would affirm the order appealed from.

MACLENNAN and GARROW, JJ.A., concurred with OSLER and MOSS, JJ.A.

Appeal dismissed with costs.

MACMAHON, J.

JUNE 27TH, 1902.

TRIAL.

LANZ v. McALLISTER.

Patent—Infringement—Apple Syrup—Novelty—Onus of Proof.

Action against defendant for alleged infringement of plaintiff's patented process for manufacturing apple syrup.

J. P. Mabee, K.C., and A. G. Campbell, Harriston, for plaintiff.

E. E. A. DuVernet and E. P. Clement, Berlin, for defendant.

MACMAHON, J.—Bicarbonate of soda was used by a Mr. Snyder in 1888 (four years prior to the issue of the plaintiff's patent) in a public manner in the making of apple syrup when Taylor, Gideon Brake, and Noel Marshall were present. And other cider mills in the vicinity of Snyder's were making apple syrup before 1892, for in that year Snyder's customers told him that the other mills were making it and asked him to make the syrup.

This is a patent for "the certain process for manufacturing apple syrup," and the action is for the infringement by the defendant in manufacturing apple syrup by the process and invention of the plaintiff, so that, even if the process were patentable, the onus was on the plaintiff to shew that the articles manufactured in infringement had in fact been so made: Frost's *Law of Patents*, 2nd ed., p. 580; *Palmer v. Wagstaff*, 8 Ex. 840, 9 Ex. 494. The defendant in manufacturing syrup omitted many of what are called the requirements in the specification, e.g., after heating the cider in the evaporator he did not run it off into a vat and let it cool off, nor did he put it in a copper kettle and heat over fire again until it came to the heat specified.

There was absolutely no novelty in the so-called process for which the plaintiff obtained a patent.

The action will be dismissed with costs.

FALCONBRIDGE, C.J.

JUNE 28TH, 1902.

WEEKLY COURT.

MERRITT v. NISSEN.

Costs—Receiver—Partnership—Advance by Partner—Priority.

Motion by plaintiff for judgment on further directions in a partnership action.

J. Bicknell, K.C., for plaintiff.

J. W. McCullough, for defendant.

H. T. Beck, for receiver.

FALCONBRIDGE, C.J., gave judgment discharging receiver and directing payment by plaintiff and defendant of receiver's allowance (as fixed by the Master) and his solicitor's fees and disbursements for issuing and filing report and of this motion; the amount advanced by plaintiff under the terms of the partnership articles to be paid out of the assets in priority to the costs of the action; after satisfaction of receiver's claim as above, plaintiff to apply balance of purchase money on his own claim, and he is not directed to pay the money into Court; no order, except as above, as to costs of this motion.

BRITTON, J.

JUNE 28TH, 1902.

CHAMBERS.

BANK OF HAMILTON v. HURD.

Partition—Tenant by the Curtesy—Mortgagees—Judgment Creditor of Owner of Undivided One-Fourth Interest.

Motion under Rule 956 for partition or sale of certain lands in the village of Burlington and township of Nelson. The land was owned by Ophelia E. Hurd, who died intestate in September, 1881, leaving her husband and five children. Since the death of the mother, one of the children has died intestate and unmarried. Of the four remaining children, three have conveyed their interests to their father, so that he is now tenant by curtesy of the whole and the owner of three undivided fourth parts in the remainder. The remaining son, H. S. Hurd, procured his father to become surety for him and gave him a mortgage as security. The Bank of Hamilton were the son's creditors and held this mortgage, which they sold and assigned to one Lashing, and Lashing is now the mortgagee. H. S. Hurd owed

the Bank of Hamilton a further sum, for which they obtained judgment against him, and afterwards a mortgage from him for whatever interest he had in this property. The Bank of Hamilton and H. S. Hurd together now ask for partition against the father. Lashing objects to the partition.

H. L. Drayton, for plaintiffs.

W. T. Evans, Hamilton, for defendants.

BRITTON, J., held that, under the circumstances, the order for partition should not be made.

Motion dismissed with costs.

STREET, J.

JUNE 27TH, 1902.

TRIAL.

DOHERTY v. MILLERS AND MANUFACTURERS
INS. CO.

Fire Insurance—Non-Payment of Premium—Re-insurance.

Action tried at Goderich, without a jury. Action to recover \$24,523.75 in respect of damage done by fire to the plaintiffs' property at Clinton. The property was insured by two policies issued by defendants, but the premiums had not been paid, although the defendants had re-insured their risk.

W. Proudfoot, Goderich, for plaintiffs.

W. Barwick, K.C., for defendants.

STREET, J., held that no contract existed between the plaintiffs and defendants for an insurance for the year beginning 31st October, 1901.

Action dismissed with costs.

FALCONBRIDGE, C.J.

JUNE 11TH, 1902.

CHAMBERS.

LONDON LIFE INSURANCE CO. v. MOLSON'S BANK.

Discovery—Production—Privilege—Information and Documents Obtained Prior to Action, but Not in View of It.

Appeal by plaintiffs from order of local Judge at London directing plaintiffs' manager to attend, at his own

expense, for further examination for discovery, and to produce documents and answer questions for which he claimed privilege on his former examination, on the ground that such information and the documents relating thereto were obtained after consultation with and upon the advice of plaintiffs' solicitors, with a view to the litigation which has since arisen between the parties. The local Judge held that there being no litigation actually pending, or even threatened, when such information and documents were obtained, the same were not privileged.

J. H. Moss, for plaintiffs.

I. F. Hellmuth, for defendants.

FALCONBRIDGE, C.J., held that there was privilege, following the principles laid down in *Wheeler v. Le Marchant*, 17 Ch. D., 675; *Minet v. Morgan*, L. R. 8 Ch. 361; and *London v. Blackney*, 23 Q. B. D. 332.

Appeal allowed. Costs in cause to plaintiffs.

E. L. Jeffery, London, solicitor for plaintiffs.

Ivey & Dromgole, London, solicitors for defendants.

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STREET, J.

JUNE 26TH, 1902.

TRIAL.

ALLAN v. REVER.

Dower—Assignment by Infant Devisee—Rights of Executor—Devolution of Estates Act—Assent of Executor subsequent to Action.

Action by widow and infant son of William Allan, deceased, to recover possession of 50 acres of land from a tenant of deceased. William Allan died 3rd August, 1901. By his will he devised 150 acres to his infant son, and made no provision for his widow. He named his son and one Ritchie executors. Ritchie proved the will on the 30th August, 1901. On 14th April, 1902, the son executed a conveyance of 50 acres of the land to his mother for her life, as and for her dower in the whole. On the 20th September, 1900, the deceased had made a lease under seal of the same 50 acres to defendant for five years from 1st March, 1901, under which he claimed title. This action was begun on 1st May, 1902, and after it was begun Ritchie executed a deed poll, declaring that he assented to the devise to the infant, and that it was not necessary to sell the lands for payment of debts or otherwise, and conveying the land to the devisee, and consenting to be added as a party.

W H. Blake, K.C., for plaintiffs.

A. Shaw, K.C., for defendant.

STREET, J.:—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but as soon as her dower is properly assigned she is entitled to claim possession of the land assigned to her in priority to leases created by her husband without her assent during the coverture: *Stoughton v. Leigh*, 1 Taunt. 402, 410. . . . Under sec. 4 of the Devolution of Estates Act, R. S. O. ch. 127, all estates of inheritance vested in any person shall, on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts. The right to dower, or to compensation in lieu of it, is preserved to

the widow by sub-sec. 2 of sec. 4, but it is at the same time expressly provided by sub-sec. 3 of sec. 11 that the personal representative, without the consent of the widow, may be authorized to convey the land free from the dower. Under sec. 4, I think it is clear that the whole inheritance of the testator vested in the executor, and that he became, upon his appointment, the tenant of the freehold. It was argued that, because, under sec. 13, the estate vested in him by sec. 4 passes automatically away from him to the devisee at the end of the prescribed period (now three years), unless a caution be sooner registered, therefore his estate must be taken to be an estate limited to him for a shorter period than that required to convey a freehold upon him. I cannot agree to this. I think the executor, during the time he holds the estate, holds the whole of the estate which the testator was possessed of when he died (in this case the fee simple); that when the executor sells and conveys land to pay debts, he is transferring an estate which is vested in him, and not merely executing a statutory power to sell land, the title to which is vested in the heir or devisee. . . . Here the devisee had no power to assign dower. . . . At the time this action was begun the widow had no estate in the land. . . . The subsequent assent of the executor cannot relate back to the commencement of the action so as to give her a title then. Action dismissed with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiffs.
Shaw & Shaw, Walkerton, solicitors for defendant.

JUNE 28TH, 1902.

C. A.

LOSSING v. WRIGGLESWORTH.

Defamation—Words Not Defamatory per se—Innuendo—Onus of Proof.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiff for \$50 damages and costs upon the findings of the jury in an action for libel and slander.

A certain mare had been replevied from plaintiff by one McNally, who alleged that it had been stolen from him by Humphreys, and sold to plaintiff, who knew it had been stolen. At the trial Lossing swore that he had raised the mare, and that she had never been out of his possession. The action finally resulted in his favour. Before judgment, and between its date and the date of the judgment at the first trial, which had resulted in McNally's favour, Lossing alleges that the defendant stated, falsely and maliciously, as follows, on different occasions:—"I have seen this

mare in Humphreys's possession, and shortly afterwards I saw it in Lossing's possession." "I saw Humphreys have this mare. He tried to trade her to me, and just afterwards I saw her in Lossing's possession." "I know all Lossing's horses; he never raised the mare. I seen Humphreys driving her, and then seen Lossing driving her a few days after." "McNally has two witnesses who were present when Lossing traded and got the mare from Humphreys:"—meaning thereby that plaintiff had committed perjury, and had purchased the mare knowing her to have been stolen.

G. H. Watson, K.C., G. G. Duncan, Norwich, and Neil Sinclair, for appellant.

G. F. Shepley, K.C., and J. C. Makins, Stratford, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The plaintiff was unable, even plausibly, to contend that the words proved to have been spoken or written, in themselves, in their natural signification, gave rise to a cause of action. Taken literally, and in their primary and obvious meaning, they are perfectly harmless, and they can only be actionable if shewn to have been spoken and written under circumstances which will fairly admit of their bearing a defamatory construction. The duty of the trial Judge in such a case is laid down by Lord Selborne in *Capital, &c., Bank v. Henty*, 7 App. Cas., at p. 744. The words here written and spoken, being in themselves harmless, and *prima facie* not even spoken of and concerning the plaintiff, it was incumbent upon him to prove facts to shew that they were capable of the meaning ascribed to them by the innuendo. This he has failed to do. Appeal allowed with costs, and action dismissed with costs.

MACMAHON, J.

JULY 3RD, 1902.

CHAMBERS.

RE SNYDER.

Life Insurance—Certificate—Change of Beneficiary by Indorsation Referring to Will—Absence of Any Provision in Will—Effect of—R. S. O. ch. 203, sec. 151, sub-secs. 3, 6; sec. 59, sub-sec. 2—1 Edw. VII. ch. 21, sec. 2, sub-sec. 7.

Motion by the executors and trustees under the will of Simon Snyder, and by Minnie Emma Snyder and Alberta Lucinda Snyder, the adult children of the testator, for an order directing payment out of Court to the executors of

insurance moneys paid in by the Ancient Order of United Workmen. On 9th December, 1881, this society issued to the testator a beneficiary certificate for \$2,000, payable to his wife Elizabeth Snyder, the beneficiary named in the certificate, on the death of the assured. Elizabeth Snyder died on the 10th March, 1889. The testator married again, some years later. On the 16th April, 1895, he indorsed on the certificate a revocation of the direction as to the payment of the insurance, and directed such payment to be made "to my children, as directed by my will." He died on the 22nd March, 1902, having on the previous day made his will, probate of which was granted to the executors now applying. By the terms of the will, the executors are to sell and convert all the estate into money as soon as they may find it profitable so to do; they are to provide a residence for the widow, and to pay her a life annuity of \$250; and, subject to such annual payment, "my executors shall divide all the rest and residue of my estate between my children, share and share alike, as follows: one-quarter of the share of each child to be paid to him or her respectively when he or she attains the age of 21 years; another quarter . . . when he or she attains the age of 25 years; another quarter . . . when he or she attains the age of 30 years; and the balance . . . when he or she attains the age of 35 years." The testator left six children: Herbert M. (39); Alfred H. (36); Minnie E. (34); Alberta L. (21); Florence M. and Clayton H. (infants). By the Insurance Act, R. S. O. ch. 203, sec. 151, sub-sec. 6, as amended by 1 Edw. VII., ch. 21, sec. 2, sub-sec. 7:—"If one or more of the beneficiaries die in the lifetime of the assured, and no apportionment or other disposition is subsequently made by the assured, the insurance shall be for the benefit of the surviving beneficiary or beneficiaries in equal shares, if more than one; and if all the beneficiaries die in the lifetime of the assured, the insurance shall be for the benefit, in equal shares, of the surviving infant children of the deceased, and if no surviving infant children, then the benefit of the contract and the insurance money shall form part of the estate of the assured." The assured could, on the death of his wife—the sole beneficiary, of the preferred class—under sub-sec. 3 of sec. 151, by instrument in writing attached to or by indorsement on or identifying the said contract by a number or otherwise, have substituted new beneficiaries, of the preferred class, which includes children (sec. 59, sub-sec. 2).

E. E. A. DuVernet, for the applicants.

F. W. Harcourt, for the official guardian.

MACMAHON, J.:—The assured could, on the death of his wife—the sole beneficiary of the preferred class—under sub-sec. 3 of sec. 151, “by instrument in writing attached to or by indorsement on or identifying the said contract by number or otherwise . . . substitute new beneficiaries,” who must be of the preferred class, which class includes children, grandchildren, and mother of the assured: sec. 159, sub-sec. 2.

Now, the assured, seven years after making the indorsement already referred to on the beneficiary certificate, made his will, by which he directed that the whole of his estate be divided amongst his children—there being both adult and infant children—in equal shares.

Had the assured simply indorsed the certificate making the insurance payable to his children without any reference to his will, the beneficiaries would have been sufficiently designated, as all the children living at the time of his death would have been entitled to share equally in the fund: *Mearns v. A. O. U. W.*, 22 O. R. 34. But the indorsement on the benefit certificate did not effect a complete substitution of new beneficiaries, as the children who were by the terms of the indorsement to receive payment of the fund were such as he should direct by his will. The will—the instrument in writing by which, under the Act, the beneficiary may be designated or ascertained—makes no reference whatever to the benefit certificate (the contract), nor is it attempted to be identified, by number or otherwise in the will, as required by sec. 151, sub-sec. 3, so as to create, under the statute, a substitution of new beneficiaries.

The assured, when he indorsed the beneficiary certificate, may have intended that his infant children should be the new beneficiaries under his will. But, as the amendment to sec. 151, sub-sec. 6, by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 7, by which, in the event of new beneficiaries not being appointed as provided by the Act, the insurance fund would be payable to his infant children, was passed a year prior to the making of the will, he may have considered it unnecessary to deal with the benefit certificate by his will, leaving the infant children to take the fund, under the Act.

Were the applicants—the executors—to succeed on this motion, the result would be that the estate of the assured would get the benefit of this insurance fund, and, as a consequence, the creditors of the assured might be paid out of it. It was in order to prevent this that the Act provides that, where the beneficiary is of the preferred class, the assured shall not divert the benefit “to a person not of

that class, or to the assured himself, or to his estate." sec. 151, sub-sec. 3.

The motion fails, and it is declared that Alberta Lucinda Snyder, Florence Maude Snyder, and Clayton Henry Snyder, who were at the time of the death of Simon Snyder his infant children, are entitled to the fund created by said benefit certificate and paid into Court, in equal shares, less the sum of \$15 to be transferred to the account of the official guardian for his fees on this motion. And Alberta Lucinda Snyder having since the death of her father attained the age of 21 years, it is directed that her share, together with the accrued interest thereon, be paid out of Court to her; and that the shares of the other infants be paid out to them on their respectively reaching the age of 21 years.

The costs of the executors, as between solicitor and client, to be paid out of the testator's estate.

BRITTON, J.

JUNE 28TH, 1902.

CHAMBERS.

RE PETTIT.

Dower—Election—Distributive Share of Estate.

Application by the Trusts and Guarantee Co., guardian of the estate of Charles Harold Pettit, a son of William J. Pettit, deceased, under Rule 972, for an order as to the distribution of the proceeds of the real estate of the deceased, and the apportionment of the dower of Rebecca Ellen Pettit, also deceased.

T. R. Atkinson, Simcoe, for applicants.

G. W. Wells, K.C., for administrator *de bonis non* of William J. Pettit's estate.

E. E. A. DuVernet, for administrator of widow's estate.

F. W. Harcourt, for official guardian.

BRITTON, J.:—The widow of the intestate took out letters of administration, and, with the consent of the official guardian, the land was sold, and she joined in the conveyance as administratrix and individually to bar her dower. The purchase money was paid into Court, the administratrix reserving the right to elect as to whether she would receive a distributive share of the estate or her dower in the land. It seems to have been clearly understood that she had a right to dower, and that she was to be paid out of the fund in Court a sum in lieu of dower, unless she elected to take her share.

Subsequently she executed what purports to be a declaration of election, after the recital, in these words:—

"I . . . have elected and do hereby elect to take the value of my dower in said lands, to be computed upon the principles applicable to life annuities, in lieu of and instead of any other interest I may have in my husband's undisposed of real estate."

She was ill when she made this declaration, and she died on the 8th April, 1901, without fully administering the estate of her husband, and leaving this money in Court. Letters of administration to her estate have been granted to Edgar Burch, and letters *de bonis non* of the estate of William I. Pettit have been taken out by John Stickney. The Trusts and Guarantee Company have letters of guardianship to the infant Charles Harold Pettit.

The question for my determination is, whether the widow, Rebecca Ellen Pettit, was in her lifetime entitled to any part of the proceeds of this land, and, if so, whether a distributive share or the value of her dower.

At the time of the sale of the land and the conveyance of it, and all along after, it was recognized that the widow was entitled to dower in this land, unless she should elect to take a distributive share of the proceeds, under sub-sec. 2, sec. 4, ch. 127, R. S. O. 1897. She did not so elect. The document she signed was not such a "deed or instrument in writing" as is contemplated by that section. On the contrary, instead of electing to take her interest under that section, in her husband's undisposed of real estate, in lieu of all claims to dower, she said she would take the value of her "dower in said lands, to be computed upon the principles applicable to life annuities, in lieu of and instead of any other interest," &c.

The solicitor, in drawing up this instrument for Mrs. Pettit to sign, evidently had in mind ch. 168, sec. 9, R. S. O. 1897, and also, perhaps, sec. 11, sub-sec. 4, of the Act respecting the Devolution of Estates. I think it was the widow's intention—acting upon advice—that she should get, and she was satisfied with it, a gross sum in lieu of dower or in settlement of her dower. She signed the deed with the understanding that she was entitled to, at least, some amount in lieu of dower; that the money was paid into the bank to protect her, as well as the estate; and there is no reason why she should not be entitled to it. She was 46 years of age when the land was sold—and her dower interest, calculated according to the tables, Appendix G., Scribner on Dower, 2nd ed., would be \$656.40.

It makes no difference that Mrs. Pettit died soon after this land was sold and the money paid into Court.

The amount must be determined according to tables based on expectancy. It is her expectancy which is to be

valued. See *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505; *Re Rose*, 17 P. R. 136; *Baker v. Stuart*, 25 A. R. 445.

The order should go that the estate of William I. Pettit should be wound up; that out of the money paid into Court the estate of the widow should get \$656.40, and interest at rate paid by the bank; and that the infant Charles Harold Pettit is entitled to residue, after payment of debts and costs.

Costs of all parties to this motion out of estate.

MACMAHON, J.

JUNE 28TH, 1902.

WEEKLY COURT.

RYERSON v. MURDOCK.

Master and Servant—Contract by Servant Not to Engage in Business—Wrongful Dismissal of Servant—Subsequent Engaging in Same Kind of Business—Not a Breach of Contract.

Motion by plaintiff for an interim injunction to restrain defendant from breach of an agreement with plaintiff that "he will not, in the Province of Ontario, directly or indirectly, either by himself or by or through any person or persons whomsoever, either as owner, agent, or salesman, or otherwise howsoever, engage or be interested in the selling or disposing of the class of goods usually handled by (the plaintiff) for a period of two years from the date." The defendant was managing salesman for the plaintiff for the sale of house furnishings, and made the agreement before entering upon the service. The plaintiff required the defendant to give a bond and pay the premium thereon, and also made a change in the contract which affected the defendant's commission.

W. A. Skeans, for plaintiff.

R. B. Beaumont, for defendant.

MACMAHON, J., held that a master cannot demand the resignation of his employee on an untenable ground, and, when the demand is complied with, use it as an instrument to prevent him earning a livelihood through being employed in the business to which he is accustomed.

Motion dismissed with costs.

FALCONBRIDGE, C.J.

JUNE 28TH, 1902.

TRIAL.

HEAL v. SPRAMOTOR CO.

Contract—Breach—Subsequent Letter as to Contract—Satisfaction—Waiver—Evidence.

Second trial of an action to recover \$329.28 and interest

for goods sold and delivered and work and labour performed.
See ante p. 175.

P. H. Bartlett, London, for plaintiff.

J. C. Judd, London, for defendants.

FALCONBRIDGE, C.J., directed judgment to be entered for plaintiff after 30 days for \$309.85, less \$150 paid into Court, with costs.

MACMAHON, J.

JULY 2ND, 1902.

CHAMBERS.

RE SCADDING.

Will—Legacy—Interest on—Legatee Attaining 21 Years—Miserable Fund.

Application by Mary Ann Scadding and Charlotte Millicent Scadding, under Rule 938, for an order determining the question whether interest is payable on the legacies bequeathed to Frederick M. Scadding (assigned to Mary Ann Scadding) and Charlotte Millicent Scadding, by the will of Charles Scadding, deceased, from the time of their respectively attaining the age of twenty-one. By the will the testator devised and bequeathed all his estate, real and personal, to the executors upon trust to sell and dispose of it and convert it into money (with certain exceptions), and to invest the moneys, and "out of the rents, dividends, and annual proceeds and interest of my said estate I direct that the trustees of this my will shall first deduct and pay unto A. C. . . . \$800 annually . . . and shall pay the balance of the said interest, dividends, and annual proceeds unto my wife during the term of her natural life. . . . Upon the decease of my said wife I direct the trustees . . . to divide all my estate amongst my children. . . . Subject to the aforesaid life interest payable to my wife, I give, devise, and bequeath to my grandchildren Frederick Mitchell Scadding and Charlotte Millicent Scadding the sum of one thousand dollars each, to be paid to each on their respectively attaining the age of twenty-one years, and in case my estate is divided before they reach that age, the principal is to be invested, and the interest thereon is to be paid to their mother for them annually, in the discretion of my executors. In case either of my said last mentioned grandchildren shall die before he or she attains the age of twenty-one years, the said sum so bequeathed to the one so dying is to revert to my estate." The testator died on the 19th June, 1892, and his widow on the 10th January, 1902. 1891, and assigned the legacy payable to him under the will Frederick Mitchell Scadding came of age on the 22nd April,

to his mother, Mary Ann Scadding, on the 26th December, 1896. Charlotte Millicent was twenty-one on the 29th December, 1896. A. C. is still alive.

W. Bell, Hamilton, for the legatees.

C. A. Masten, for the executors.

MACMAHON, J.—Although the legacies became vested upon the legatees attaining majority, payment was postponed until the death of the widow, there being no fund out of which to pay until the event happened. The fund is a mixed one; the legacies are general; and the time of payment is fixed by the testator; and in such cases the rule is, that the legacies will carry interest from the arrival of the appointed period. It does not make any difference that the legacies are vested: Williams on Executors, 9th ed., p. 1290; Toomey v. Tracey, 4 O. R. 708; Lord v. Lord, L. R. 2 Ch. at p. 789. Order declaring that the executors should pay out of the estate interest upon the legacies from the dates of the legatees attaining majority. Costs of all parties out of the estate.

OSLER, J.A.

JUNE 30TH, 1902.

C. A.—CHAMBERS.

RE PRINCE EDWARD PROVINCIAL ELECTION.

WILLIAMS v. CURRIE.

Parliamentary Election—Recount of Votes—Ballot Paper—Names and Numbers of Candidates—Error of Deputy Returning Officer in Tearing off Number—Number not Material—R. S. O. ch. 9. secs. 2, 69 (2), (3), (4), 106.

Appeal by Williams from the decision of the Judge of the County Court of Prince Edward upon a recount of the ballots cast at the election, under sec. 129 of R. S. O. ch. 9. There were two candidates at the election. Their names and numbers were printed on the ballot papers in ink of different colours, as required by sec. 69 (3) of ch. 9. At 14 polling places in the electoral district the deputy returning officer in detaching the ballot paper from the counterfoil did so in such a manner that the candidates' numbers were left on and as part of the counterfoil, instead of being on and appearing as part of the ballot paper. If the ballot papers in that condition ought to have been rejected, the appellant candidate should have been returned as having the majority of legal votes. Section 69 (2) provides that every ballot paper shall contain the names of the candidates arranged alphabetically in the order of their surnames, and the ballot papers may be according to form 11 in Schedule A to the Act. By sub-sec. 3, the numbers and names of

every candidate shall be distinctly printed in ink of different colours. By sub-sec. 4, it is provided that every ballot paper shall have a counterfoil attached thereto, and every ballot paper and every counterfoil shall specify the name of the electoral district for which it is to be used, and every ballot paper shall have a number printed on the back thereof, and the same number shall be printed on the face of the counterfoil attached thereto. The number mentioned in sub-sec. 3 is, of course, not the number mentioned in sub-sec. 4. The latter is the number which is to be on the face of the counterfoil and the back of the ballot paper for the express purpose of identifying the voter and finding out how he has voted. The former is the number of the candidate on the face of the ballot paper, and is nowhere referred to or mentioned in the Act, except in sub-sec. 3, and then only in connection with colour printing.

S. W. Burns and Eric N. Armour, for appellant.

C. H. Widdifield, Picton, for respondent.

OSLER, J.A.—Sub-sec. 2 is the only section which contains any positive enactment as to what is required to be printed on the face of the ballot paper, aside from its mere form. Nothing more seems necessary than the names of the candidates. For the rest, the ballot papers may be in the form given in the schedule. That is directory; and the form shows a number in a compartment to the left of the candidate's name, indicating the order in which it appears on the paper. This number is not to be regarded as an essential part of the ballot paper. The number might be an aid to an illiterate voter, but in the observance of any positive enactment (apart from colours), the error of the deputy returning officer in tearing off the number, ought not to work the destruction of the ballot, nor should the Act be strained in favour of the illiterate voter. Section 106 goes far enough in that direction. Section 2 is the mandatory clause as to what is to be printed on the face of the ballot, and as it says nothing about the number of the candidate, such number is not a material part of the ballot paper. Appeal dismissed. No order as to costs.

MEREDITH, J.

JUNE 30TH, 1902.

CHAMBERS.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v.
STANLEY.

Execution—Costs of Application for Leave to Appeal to Court of Appeal—Power to Award Costs—Execution Issued out of High Court—Judicature Act, secs. 77, 119—Rules 3, 818, 1130.

Motion (heard at London) by defendant to set aside

fi. fa. issued by plaintiffs for the costs of an unsuccessful application made by the defendant to a Judge of the Court of Appeal (1 O. W. R. 399) under the order of that Court dismissing the application with costs. The defendant now moved on the grounds that there was no power to make the order for payment of costs, and that there was no right to issue the writ out of the High Court.

W. H. Bartram, London, for defendant.

J. C. Dromgole, London, for plaintiffs.

MEREDITH, J.—By sec. 77 of the Judicature Act the defendant's application to the Court of Appeal for leave to appeal was expressly authorized, and power is given to the Court or a Judge to grant—in certain cases—or to refuse, the leave applied for; and by sec. 119, subject to Rules of Court and to the express provisions of any statute, the costs of and incidental to all proceedings in the Supreme Court of Judicature are in the discretion of the Court or Judge, and the Court or Judge has full power to determine by whom and to what extent such costs shall be paid; and part of Rule 1130 is to the same effect; and under these provisions the statutory power to support the order was given. Under Rule 3, by analogy to the procedure under Rule 818, execution may be rightly issued in the High Court to enforce payment of such costs as those in question, in the manner provided for in the latter Rule. Motion dismissed with costs, fixed at \$5. If defendant desires, the execution may be stayed pending an appeal from this order, upon payment to the sheriff of the amount to be levied, including sheriff's fees, etc., to abide the result of the appeal.

MEREDITH, J.

JUNE 30TH, 1902.

CHAMBERS.

RE CRAWFORD.

Will—Direction to "Supply Wants" of Widow and that Executors might "Draw upon Such Money" as Testator might Die Possessed of—Sale or Mortgage of Real Estate.

Application (heard at London) by executors of will for opinion of Court. The question was whether the executors were empowered by the will to resort to the testator's real estate in order to supply the "wants" of the widow. The will provided that, if the widow should be in need of more than the income given to her in it, "to supply her wants," the executors might "draw upon such money" as the testator might die possessed of. By a codicil, the executors were empowered to draw upon any of his property to supply those wants.

J. C. Judd, London, for executors.

W. H. Barnum, Dutton, for widow.

J. M. Glenn, K.C., for Dugald Crawford.

MEREDITH, J.:—The testator's first care, in his will and in that codicil, is that the wants of his widow shall be satisfied; and that which remains only is to go to his collateral relatives. The codicil makes it plain that the executors may have recourse to the real estate to satisfy the widow's wants, if need be. The wants of the widow, in case of her needing more than is given to her in the first three clauses of the first paragraph of the will, are to be supplied by the executors by drawing upon the testator's property. In the circumstances of this case, the real estate can be drawn upon only by pledge or sale. The executors have power to so draw upon it, in the circumstances and for the purpose mentioned; this confers upon them implied power, at least, to sell or mortgage for that purpose, in these circumstances. Order declaring the opinion of the Court accordingly. Costs out of the estate; those of the executors as between solicitor and client.

OSLER, J.A.

JUNE 30TH, 1902

C. A.—CHAMBERS.

DAVIS v. HORD.

Appeal—Leave—Action for Slander—Costs—Apportionment of.

Motion by defendant for leave to appeal from order of a Divisional Court, ante p. 418.

The same counsel appeared.

OSLER, J.A.—This is not a case in which leave should be granted. There is no good reason why a judgment framed as is the judgment at the trial in this case should not lead to the same result as the former rule. See *Sparrow v. Hill*, 8 Q. B. D. 479, and *Jenkins v. Jackson*, [1891] 1 Ch. 89. The practice is right, but it is even more convenient that it should be settled. In every case the trial Judge can shape the judgment so as to express an intention as to the incidence of the costs. Motion refused with costs.

BRITTON, J.

JUNE 30TH, 1902.

CHAMBERS.

RE McMILLAN.

Will—Devise of "Chattels, Money, and Notes"—Mortgage Undisposed of by the Will Passes under the Word "Chattels."

Application by the executors of the will of Isabella McMullan (under Rule 938) as to whether Isabella McMillan

was entitled to a certain mortgage made in favour of John McMillan, or whether John McMillan died intestate in respect to that mortgage. John McMillan was an unmarried man of considerable means, residing in the township of Cornwall. He made his will on the 27th February, 1886, apparently disposing of all his property. At that time he was the owner of two parcels of land. He devised one parcel to one Corbett, and the other to his sisters Mary McMillan and Isabella McMillan. Then followed this clause in the will: "I will and bequeath to my sisters Isabella McMillan and Mary McMillan all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me. I will and bequeath the said chattels, moneys, and notes to the one of said sisters who may survive me." Mary died before the testator. After her death, John, by a codicil dated 14th August, 1892, "erased," as he said, from the will the parcel of land devised to Mary and Isabella, and devised it to Isabella. He made no other change in the will. John McMillan, before the making of the codicil, had sold to another the land previously devised to Corbett, and the mortgage in question is for the unpaid purchase money upon that land.

C. A. Masten, for executors of Isabella McMillan.

W. M. Douglas, K.C., for next of kin of John McMillan.

BRITTON, J., held that the mortgage passed to Isabella, as the sister who survived the testator, under the word "chattels" in the will. Order accordingly. Costs of all parties out of the estate of Isabella McMillan.

MACLENNAN, J.A.

JULY 2ND, 1902.

C. A.—CHAMBERS.

RE LENNOX PROVINCIAL ELECTION.

CARSCALLEN v. MADOLE.

Parliamentary Election—Recount of Votes—Ballot Papers not Objected to before Deputy Returning Officers—Form of Ballot Papers—Cross Outside Upper Line—Circular Mark—Marks in Addition to Regular Cross—Words—Initials—Indefinite Marks.

Appeal from a recount of ballots by the Judge of the County Court of Lennox, who found the votes cast for the two candidates, Carscallen and Madole, to be equal. Carscallen appealed in respect of seven ballots, and Madole appealed generally. It was arranged that Carscallen's appeal should first be heard and disposed of, and this judgment deals only with his appeal.

S. H. Blake, K.C., W. D. McPherson, and E. G. Porter, Belleville, for Carscallen.

G. H. Watson, K.C., and Grayson Smith, for Madole.

MACLENNAN, J.A.—It was objected that the County Court Judge was confined in the recount to the consideration of cases in respect of which an objection was made before the deputy returning officer when counting the votes at the close of the poll. I think this objection should be overruled: see secs. 112 (4), 124 (1), and 126 of the Election Act.

The ballot papers used at this election were in the form prescribed by the statute, having two divisions for the names of the candidates separated by a line from left to right, and also having a line above the upper division, and one below the lower division, parallel to the dividing line. Outside of these last-mentioned lines, there is a margin about half an inch wide. Ballot 405 was marked with a cross outside, but near, the upper line or boundary of Carscallen's division, and was rejected. I think that it should be allowed, for the upper line is not essential, and a ballot without an upper line would be good. All that is above the first name may be regarded as a part of the division of the first candidate, and all below the second name as a part of the division of the other candidate. *West Elgin Case*, 2 E. C. 41, applied. *North Bruce Case* (1901, per Boyd, C., and Street, J.), unreported, distinguished because of the express directions of sec. 72 of the *Dominion Election Act*, 63 & 64 Vict. ch. 12, that the cross shall be made in the white space containing the name of the candidate.

Ballot 4032 is marked in the proper place for Madole, but the mark is a circle, not a cross, and not an apparent attempt to make a cross. I think that the vote must be disallowed.

Ballot 4004 is well marked for Carscallen, but was disallowed because of an irregular shapeless pencil mark in Madole's division. This should not have been disallowed, but should be counted for Carscallen, not being a cross or any attempt to make a cross, nor a mark by which the voter could be identified.

Ballot 5288 was also distinctly marked by a cross for Carscallen. It had, however, in Carscallen's division, in the sub-division containing his number, the initials S. A. in small but legible capitals. This was rejected by the County Judge. I have spoken to my brother Osler, and he agrees with me, that any written word or name upon a ballot, presumably written by the voter, ought to

vitiating the vote, as being a means by which he could be identified, and in general other marks ought not to have that effect, and 5288 was properly rejected.

Ballot 2470 was marked by a somewhat irregular cross for Madole. This was rightly allowed.

Ballot 4064 had crosses in the divisions of both candidates. This was properly rejected.

Ballot 5256 was in the same plight. It was contended that there were indications of an intention to obliterate the cross in Madole's division. I think this is not a fair deduction. The ballot was properly rejected.

The result is that ballots 405 and 4004 should be added to Carscallen's poll and 4032 struck off Madole's poll, which gives Carscallen a majority of three.

MACLENNAN, J.A.

JULY 2ND, 1902.

C.A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION.

BOYD v. MCKAY.

Parliamentary Election—Recount of Votes—Ballot Paper—Distinct Cross—Obliterated Cross—Candidate's Name on Back of Ballot—Perpendicular Line instead of Cross—Horizontal Line instead of Cross—Straight Slanting Line instead of Cross—Words over Initials on Back—Cross on Back—Irregular Pencil Marking on, besides Cross—Evidence of Intention to Make a Cross.

Appeal from a recount of ballots by the junior Judge of the County Court of Grev. The candidates were G. M. Boyd and A. G. McKay, and the County Judge found a majority of five votes for McKay. Both candidates appealed, and the appeal of Boyd was first proceeded with, the appeal of McKay being deferred.

S. H. Blake, K.C., and W. D. McPherson, for Boyd.

G. H. Watson, K.C., W. H. Wright, Owen Sound, and Grayson Smith, for McKay.

MACLENNAN, J.A.—It was objected by Boyd that a junior Judge had no jurisdiction to recount votes. I think that, as it appeared by the certificate that the junior Judge acted with the concurrence and approval of the senior Judge, the jurisdiction of the junior Judge was free from doubt: see secs. 124-131 of the Election Act, and secs. 2 and 14 of the Local Courts Act, R. S. O. ch. 54.

Four ballots (6418, 6241, 6427, and 6429) counted for Boyd at No. 9, St. Vincent, were disallowed by the Judge in consequence of being marked with a cross.

not only in Boyd's division, but also in that of McKay. The Boyd crosses were on the right-hand side of his name, and were distinct and conspicuous. They struck the eye at once. The McKay cross upon three of them is obscure and indistinct, and that on the fourth, while more distinct, is much less conspicuous than the Boyd cross. I think that there was no evidence that the McKay crosses were made after the count at the close of the poll. They were not observed, in the hurry of counting, while the crosses for Boyd, being conspicuous, caused them to be at once counted for him. The same thing exactly occurred on the recount, when the Judge, without observing the two crosses, handed all four ballots, as Boyd ballots, to McKay's agent for examination, and when two of them escaped the notice of the agent also, and were not discovered until a second examination by Boyd's agent. Under these circumstances, there is hardly room even for a suspicion that the marks complained of were made after the counting of the votes. It was argued that the condition in which the ballots were found was very suspicious. There appears to have been two (a) packets furnished to the deputy returning officer with printed blank indorsements thereon. He put the ballots in one, and sealed it; but he filled up the blanks in the other, with all the proper indorsements required by sec. 116 of the Act, instead of upon the first. This seems to have been a mere mistake; and it could not have had any connection with the alleged falsification of the four ballots; which were properly disallowed.

Ballot 1293 (Owen Sound, 5) was marked with a distinct cross for McKay, and an obliterated cross in Boyd's division. This was rightly allowed.

Ballot 719 (Owen Sound, 4A) was marked for McKay but had "McKay" written on the back. This was improperly allowed.

Ballot 861 (Owen Sound, 4A) was marked for McKay with a very distinct cross, and had a very faint cross in Boyd's division. The County Judge allowed it, thinking the faint cross was an impression of the other, made by folding. I think, after careful examination, this is not so, and the vote should have been disallowed.

Ballot 8 (Owen Sound, 1) was marked with a perpendicular line, not an attempt to make a cross. I think this was rightly rejected.

Ballot 595 (Owen Sound, 3) was marked with a horizontal line. I think this was rightly disallowed.

Ballot 1082 (Owen Sound, 4) was marked with a straight slanting line. I think this was properly disallowed.

Ballot 2650 (Owen Sound, 10) was properly marked for McKay, but had the words "objection No. 1 (Boyd)" in pencil, on the back, over the initials F. C. I think this was rightly allowed, for the words appeared to have been written by the deputy returning officer.

Ballot 2671 (Owen Sound, 10) was marked with a perpendicular straight line for Boyd. I think this was rightly rejected.

Ballot 3934 (Sydenham, 2) was marked with a line. This was rightly disallowed.

Ballots 8006 (Sarawak, 3), 6406 (St. Vincent, 9), 6816 (Keppel, 3), and 4816 (Meaford, 2) were each marked with a cross on the back. These were rightly disallowed.

Ballot 5912 (St. Vincent, 5) was marked with a distinct cross for Boyd, and an indistinct one for McKay. This was rightly disallowed.

Ballot 5027 (Meaford, 4A) was marked with several tremulous connected marks in McKay's division. This was an evident cross, and rightly allowed.

Ballot 5278 (Meaford, 6A) had a strongly marked cross for McKay, and a thin, faint, upright pencil mark on the upper edge of the ballot paper, in Boyd's division, not indicative of any intention to make a cross. This was rightly allowed for McKay.

Ballot 5289 (Meaford, 6A) was marked with a distinct cross for McKay, and in the same division another slight irregular pencil marking. This was rightly allowed.

Ballot 5298 (Meaford, 6A) was marked with a distinct cross for McKay, and in the same division a series of slight, cloudy, formless pencil markings. This was rightly allowed.

Ballot 6764 (Keppel, 3) was marked with two lines lying very close to each other, but both distinctly visible in Boyd's division. The lines slant from right to left; one is a little shorter than the other. From the top and for a little more than a third of their length, they appear to coincide, and then diverge at a very acute angle. The mark appeared to have been made by two separate strokes of the pencil. Following the opinion of Ritchie, C.J., Strong and Gwynne, JJ., in the Bothwell Case, 8 S. C. R. 696, I think there was evidence of an intention to make a cross, and the vote should have been allowed for Boyd.

The result is, that two of the votes counted for McKay should be disallowed, and one which was disallowed to Boyd should be counted for him, and McKay's majority is, therefore, reduced to two.

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(TO AND INCLUDING JULY 12TH, 1902.)

VOL. I.

TORONTO, JULY 17, 1902.

No. 27.

Moss, J.A.

JULY 5TH, 1902.

C. A.—CHAMBERS.

RE CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Appeal—Leave—Award—Construction of Obscurely Phrased Section of Public Schools Act—Matter of Public Interest.

Motion by the township corporation for leave to appeal from the order of a Divisional Court (ante 387) allowing an appeal from an order of a Judge in Chambers and granting a mandamus to the corporation requiring them to pass a by-law for the issue of debentures for \$1,000 for the purpose of the purchase of a school site and the erection of a school-house.

A. B. Aylesworth, K.C., for motion.

W. R. Riddell, K.C., for school trustees.

Moss, J.A.:—The circumstance of the first order having been made in Chambers, and the additional fact that the applicants for leave to appeal to this Court were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the motion had been heard in the first instance by a Judge sitting in Court, are material factors—when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised. An important question is raised as to the true construction of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed upon the legislative provisions in question by the Divisional Court are presented. Questions relating to the validity or invalidity, or binding effect or otherwise, of an award purporting to be made in

pursuance of these provisions are also involved, and the matter is of some public interest. Order made, giving leave to appeal upon the usual terms. Costs in the appeal.

MACMAHON, J.

JULY 5TH, 1902.

CHAMBERS.

SMITH v. MASON.

*Will—Legatees—Period of Vesting and Distribution the Same—
Realty and Personalty—Sale—Direction to Trustees to Sell and
Divide Proceeds.*

Motion by William Murdoch, one of the devisees under the will of John Smith, deceased, for an order determining the following questions arising under the will:—(1) As to the division of the estate into nine portions, in pursuance of the will, for the purpose of administration. (2) As to the payment over by the present trustees to the adult grandchildren of John Smith of their shares of the estate, or such portion thereof as has now been got in. (3) As to payments directed under clause 12 of the judgment of 30th May last. The will is dated 11th December, 1880, and appoints the defendants James Mason, Charles Smith, and Harrison B. Forbes, executors and trustees. Forbes having left the Province, Emile C. Boeckh was appointed a trustee in his place in July, 1888. The estate amounts to \$300,000, and it is asked that \$270,000 be distributed, in nine shares, amongst those entitled under the will.

E. F. B. Johnston, K.C., for the applicant.

W. M. Boulton, for plaintiffs.

H. T. Kelly, for James Mason and Charles Smith.

D. O. Cameron, for Neil J. Smith.

F. Denton, K.C., for John C. Smith.

H. T. Kelly, for all the other adult defendants.

F. W. Harcourt, for the Boeckh infants.

W. Davidson, for all the other infants.

MACMAHON, J.:—The shares of the children in the personal estate became vested on the death of the widow. The trustees are directed to divide the trust moneys (which would include the capital sum invested for the benefit of the widow) and the personal estate amongst the children. After the division, "the share" of each of the children is directed to be invested for his or her benefit. So that the time of vesting and period of distribution is the same. The realty is directed to be sold, and the moneys arising from the sale

divided equally amongst the children in the same way and subject to the same trusts and declarations as the personal estate. The period of vesting is the same, i.e., on the death of the widow. See *McDonell v. McDonell*, 24 O. R. 468; *Kirby v. Bangs*, 27 A. R. 61. There being an express direction to the trustees to divide the trust moneys arising out of the sale and conversion of the personal property and real estate among the children in equal shares on the death of the widow, and that direction not having been carried out, it is the duty of the Court to direct the distribution to be made now. All the testator's estate has been got in and converted, except a balance due on the claim against the Cooper & Smith partnership estate, which balance is partly secured by a mortgage on a house and land in the city of Toronto.

Order accordingly. Costs out of estate.

ROBERTSON, J.

JUNE 28TH, 1902.

TRIAL.

GREISMAN v. FINE.

Title to Land—Registered Title—Appurtenance.

Action to recover possession of about 175 square feet of land, part of the premises known as street No. 80 on the west side of Chestnut street, in the city of Toronto. The defendant pleaded the Statute of Limitations, but did not offer any evidence under it, and the question was one of paper title only.

N. F. Paterson, K.C., for plaintiff.

R. G. Smyth, for defendant.

ROBERTSON, J., held that the title is clearly in the plaintiff except as to the rights acquired by defendant to continue as an "appurtenant" to his premises the occupation of the small piece on which his kitchen is erected. Judgment accordingly for the plaintiff with costs.

MACMAHON, J.

JUNE 26TH, 1902.

TRIAL.

JOYCE v. JOYCE.

Partition—Sale—Verbal Agreement to Sell Interest in Land—Statute of Frauds—Part Performance—Acquiescence—Arbitration or Valuation—Notice.

Action for partition or sale of certain land.

J. E. Farewell, K.C., and W. H. Harris, Port Perry, for plaintiff.

N. F. Paterson, K.C., and S. S. Sharpe, Uxbridge, for defendant.

MACMAHON, J.:—The plaintiff had a perfect right to recede from any verbal offer she made to the defendant, her brother, to accept \$50 for her share of the land. . . . There was no reference to arbitration. The plaintiff was not aware until after the so-called arbitration that the arbitrators had met to consider the matter. She was not represented by her brother John, and, although John received notice of the arbitrators meeting, he did not appear on her behalf, and she did not receive any notice. . . . As an award or as a valuation what was done would not bind her. There is no writing to satisfy the Statute of Frauds, and the plaintiff has not acquiesced in the possession by the defendant of the land and in his making certain improvements, some of which were absolutely necessary, and they are not such acts of part performance as take the case out of the statute. See remarks of Sir James Wigram in *Dale v. Hamilton*, 5 Hare 381, quoted in *Maddison v. Alderson*, 8 App. Cas. at p. 479.

Usual judgment for sale. Reference to Master at Whitby, &c.

FALCONBRIDGE, C.J.

JULY 10TH, 1902.

TRIAL.

MANN v. CITY OF ST. THOMAS.

Municipal Corporation—Sidewalk—Repair—Gross Negligence.

Action by James Mann to recover \$1,000 damages for injuries (dislocation of shoulder) received on the 11th January, 1902, by a fall upon an icy sidewalk at the corner of Talbot street and Woodworth avenue, in the city of St. Thomas. The plaintiff charged that the defendants were guilty of gross negligence in allowing the sidewalk to be out of repair.

J. A. Robinson, St. Thomas, for plaintiff.

W. B. Doherty, St. Thomas, for defendants.

FALCONBRIDGE, C.J., held that, having regard to the place where the accident happened, the state of the weather, and the other surrounding circumstances, there is not that "gross negligence" which must exist to fasten liability on defendants. See *Ince v. City of Toronto*, 27 A. R. 410, 31

S. C. R. 323. There was a very much stronger case against defendants in *McQuillan v. Town of St. Mary's*, 31 O. R. 401. If the finding were for the plaintiff, the damages would not be sufficient to carry costs on the High Court scale. Action dismissed without costs.

JULY 7TH, 1902.

DIVISIONAL COURT.

WILDER v. WOLF.

Attachment of Debts—Division Court—Cheque—Payment Stopped—Garnishee—Payment into Court.

Appeal by primary creditor from judgment in 10th Division Court in the County of York dismissing his claim against the garnishee and ordering payment to the claimant of the money in Court. The action was brought by Wilder against Wolf to recover \$150 advanced by three cheques of \$50 each. The evidence shewed that the amount had been advanced in part payment of a car load of junk to be delivered by Wolf to Wilder, and that Wolf, having received the money, instead of delivering the car load to Wilder, sold it to Mehr (garnishee). Mehr bought in good faith, and gave his cheque for \$205 in payment to Wolf, the cheque being drawn on the Bank of Ottawa in Toronto. Wolf took it to the Canadian Bank of Commerce at Orangeville, and had it cashed there, upon Taylor (claimant) guaranteeing payment by his indorsement. Before the cheque was presented at the Bank of Ottawa in Toronto, the present action had been brought, and Mehr had been served with garnishee proceedings; he at once stopped payment of the cheque, and it was refused by the Bank of Ottawa, and was duly protested for non-payment. Mehr paid the amount of it into Court. The bank at Orangeville called upon Taylor, and he paid the amount to the bank, and now claimed the money in Court to recoup himself. Wolf denied that he owed Wilder the amount claimed, and swore that the three cheques for \$150 were to be applied upon a running account between him and Wilder. The Judge in the Division Court (MORSON, Jun. J.) gave judgment for Wilder against Wolf for the \$150 and costs, and dismissed Wilder's claim against Mehr, and ordered payment of the money in Court to Taylor.

E. E. A. DuVernet, for Wilder.

L. V. McBrady, K.C., for Mehr.

A. A. Hughson, Orangeville, for Taylor.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.:—Justice is done to all parties by the judgment appealed against, and it should be upheld. If the money in Court were to be paid out to Wilder, Mehr would be liable to pay it over again to Taylor; while, if the judgment stands, the cheque in the hands of Taylor will be satisfied by the payment out of Court to him of the money which Mehr paid in. Nothing stands in the way of this but the conclusion usually to be drawn from the fact of payment into Court by a garnishee of the amount claimed from him—that he admits his indebtedness. Here, however, all the facts and all the parties are before the Court, and it is plain that justice has been done to all without infringing any rule of law. Appeal dismissed with costs.

ROBERTSON, J.

JUNE 28TH, 1902.

TRIAL.

CENTRAL CANADA LOAN AND SAVINGS CO. v.
PORTER.

Title to Land—Registered Title—Real Property Limitation Act.

Action to recover two acres (worth less than \$200) of the east half of lot 7 in the 6th concession of the township of Manvers. Defence on the paper title and under the Real Property Limitation Act.

D. W. Dumble, Peterborough, for plaintiffs.

R. E. Wood, Peterborough, and E. B. Stone, Peterborough, for defendant.

ROBERTSON, J., found all the issues in favour of plaintiffs. Judgment for plaintiffs for possession, with costs on the County Court scale. No set-off of costs to defendant.

FALCONBRIDGE, C.J.

JULY 11TH, 1902.

ABBOTT v. GUSTIN.

Sale of Land—Specific Performance—Possession.

Action by Oliver Abbott, a farmer of Colchester South, against Robert Gustin, another farmer of the same township, and the executors of the will of the late William McCain, to recover possession of land which the defendant Gustin, as alleged, agreed to sell to plaintiff, he himself having agreed to buy it from the other defendants, and for specific performance and an injunction and damages.

J. P. Mabee, K.C., and W. A. Smith, Kingsville, for plaintiff.

A. H. Clarke, K.C., for defendant Gustin.

M. K. Cowan, K.C., for defendants the executors.

FALCONBRIDGE, C.J., found all the facts in favour of plaintiff, and gave judgment as prayed by the statement of claim, with \$25 damages.

W. A. Smith, Kingsville, solicitor for plaintiff.

Clarke, Cowan, Bartlett, & Bartlett, Windsor, solicitors for defendant Gustin.

M. K. Cowan, Windsor, solicitor for defendants the executors.

MACLENNAN, J.A.

JULY 10TH, 1902.

C. A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION.

McKAY v. BOYD.

Parliamentary Election—Notice of Appeal from Recount—Signature by Solicitor—Election Act, sec. 129 (1)—Cross-appeal after Majority Declared upon Appeal—Sec. 129 (5)—Re-opening Original Appeal.

After the disposition of Boyd's appeal, ante p. 474, McKay proposed to submit his cross-appeal from the recount.

G. H. Watson, K.C., W. H. Wright, Owen Sound, and Grayson Smith, for McKay.

S. H. Blake, K.C., E. E. A. DuVernet, and Eric N. Armour, for Boyd.

MACLENNAN, J.A.:—After I had disposed of the appeal of Mr. Boyd, which left Mr. McKay still with a majority of two, Mr. Watson, counsel for Mr. McKay, claimed the right of proceeding with his appeal. This was opposed by Mr. Blake on two grounds: first, that Mr. McKay's notice of appeal was not signed by himself personally, but by his solicitors on his behalf; and secondly, because, Mr. McKay having a majority, the further proceeding with his appeal could not alter the result, and was useless.

The first objection was rested on the language of sec. 129 (1) of the Election Act, which authorizes the candidate to appeal by giving a notice in writing, without expressly authorizing the notice to be given by an agent or solicitor; while it expressly authorizes the notice to be served upon the solicitor of the other candidate. I overruled the objection, thinking it of no weight whatever.

I also overruled the other objection, thinking that the right of appeal from the recount of the County Judge was clearly given to either candidate by sec. 129 (1), irrespective of which of them had a majority; and that by sec. 129 (5) the Judge is required to recount "the ballots or such of them as are the subject of appeal," and to certify his decision. It seemed to me, also, that, having regard to the provisions of sec. 172, a successful candidate ought to have the right to have the full tale of his lawful majority established by a recount.

On proceeding with Mr. McKay's appeal, I allowed the same in respect of four ballots, disallowing it in respect of a number of others. At this stage, counsel for Mr. Boyd claimed the right to object to certain other ballots, not previously objected to. Mr. Watson resisted this, on the ground that Boyd's appeal had been closed and disposed of. I held, however, that the appeals on both sides were still open, neither of them having been limited to particular ballots, for the reasons already mentioned. On the part of Mr. Boyd, five further ballots were then objected to, of which only one was allowed.

The result of both appeals, therefore, is that each candidate has succeeded in respect of four ballots, and the majority remains as it was found by the learned County Judge, a majority of five for McKay. I think there should be no costs to either appellant.

BRITTON, J.

JUNE 27TH, 1902.

CHAMBERS.

RE PARKS AND LAKE ERIE AND DETROIT RIVER
R. W. CO.

RE MCALPINE AND LAKE ERIE AND DETROIT RIVER
R. W. CO.

Costs—Arbitration under Railway Act—Taxation by Judge.

Motion by land-owners for order confirming taxation of costs of arbitration, and for payment by the railway company of the balance of the amounts awarded and costs.

T. W. Crothers, St. Thomas, for the land-owners.

H. E. Rose, for the company.

BRITTON, J.:—The costs not having been taxed by "the Judge," as the statute requires, and the company protesting against the taxation by a local officer of the Court, who was (upon an *ex parte* application) directed by the Judge to tax

them, I have gone carefully over the costs, and I tax them in the McAlpine case at \$1,007.37, and in the Parks case at \$358.77, and I make an order for payment, as asked by the land-owners.

Crothers & Price, St. Thomas, solicitors for the land-owners.

J. H. Coburn, Walkerville, solicitor for the company.

JUNE 28TH, 1902.

C. A.

**TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC
R. W. CO.**

Way—Road Allowance—Obstruction—Railways—Fences—Municipal Corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of Obstruction—Jurisdiction.

Appeal by defendants from judgment of LOUNT, J. (3 O. L. R. 85) upon a stated case as to the right of the plaintiffs to open an original road allowance, across which the defendants' railway runs.

F. H. Chrysler, K.C., for defendants.

G. F. Henderson, Ottawa, for plaintiffs.

THE COURT (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) dismissed the appeal with costs, agreeing with the reasons given by LOUNT, J.

JUNE 28TH, 1902.

C. A.

**DOIDGE v. DOMINION COUNCIL OF THE ROYAL
TEMPLARS OF TEMPERANCE.**

Insurance—Benevolent Society—Disability Benefit Certificate—Proof of Age of Beneficiary—Waiver by Society—Surrender of Certificate—Domestic Forum—Right to Ignore—Amendment of Constitution and By-laws.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiff for \$243, in action to recover \$1,000 on a disability benefit certificate, issued to plaintiff by defendants in 1896, in substitution for one issued when he became a member in 1884. The plaintiff alleged that he became 70 years of age on the 9th September, 1900, and that, under the terms of the certificate, he, on that date, was entitled to be paid \$1,000. The trial Judge found that the plaintiff was not compelled to wait until the year 1914, but that,

having attained the age of 70 years, he was entitled to recover, without the production or surrender of his certificate; that defendants had waived their right to have proofs of age furnished by plaintiff, and the condition requiring him to sign the certificate; that the plaintiff accepted a cheque for a small sum only on account of the \$1,000; that he was not compelled to appeal to the domestic forum of the defendants; and that alterations or amendments in their constitution and by-laws since the certificate could not have the effect of reducing the amount to which plaintiff was entitled, which was \$243, with interest from the 8th October, 1900, without prejudice to defendants' right to recover any sums which since action have become, or may hereafter become due to them in respect of the certificate.

G. H. Watson, K.C., and Z. Gallagher, for the appellants, defendants.

S. F. Washington, K.C., for the plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) dismissed the appeal with costs, and affirmed the judgment, except as to the amount recovered, which was reduced to \$108, with interest from 8th October, 1900, less \$27 received on account.

JUNE 28TH, 1902.

C. A.

HOPKIN v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Company—Electric Light Company—Nuisance—Vibration Caused by Company's Machinery—Adjoining Property—Injunction—Damages—R. S. O. 1897 ch. 200; ch. 207, secs. 9, 10, 13-20,

Appeal by defendants from judgment of STREET, J. (2 O. L. R. 240), in favour of plaintiff in action to restrain defendants from continuing a nuisance, and for damages.

G. Lynch-Staunton, K.C., and W. W. Osborne, Hamilton, for appellants.

D'Arcy Tate, Hamilton, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, J.J.A.) dismissed the appeal with costs, agreeing with the reasons of STREET, J.

MACLENNAN, J.A.

JULY 4TH, 1902.

C.A.—CHAMBERS.

RE MUSKOKA PROVINCIAL ELECTION.

MAHAFFY v. BRIDGLAND.

*Parliamentary Election—Recount of Ballots—Irregular Marking—
Initials of Deputy Returning Officer.*

Appeals by both candidates from the decision of the Judge of the District Court of Muskoka upon a recount of the votes cast at the election.

C. A. Masten and Eric N. Armour, for Mahaffy.

R. A. Grant, for Bridgland.

MACLENNAN, J.A.:—On Mahaffy's appeal, I disallow all the objections to the Judge's rulings except two. Two ballots, numbered 5081 and 7971, were marked for Bridgland with a straight line only, and were allowed for him. I think they should have been rejected.

On Bridgland's appeal, two ballots, numbers 1761 and 6987, were marked with a cross, the one upon, and the other above, the upper line. These were rejected. I think they should have been counted for Bridgland. No. 5067, marked with a straight line and allowed for Mahaffy, should be disallowed. No. 26, disallowed by the Judge, should be allowed for Bridgland—a cross made by three or four strokes of the pencil.

The Judge disallowed all the votes at No. 17 Wood and Medora, on the ground that the deputy returning officer, whose name was Henry Cully Guy, initialled all the ballots at his poll "H. G.," instead of "H. C. G." The Judge also disallowed all the votes at poll 18 Wood and Medora, on the ground that the deputy returning officer, William D. McNaughton, indorsed the ballots with the initial "McN.," instead of with the full initials of his name.

I am of opinion that—the sole purpose of requiring the deputy returning officer to indorse his name or initials upon the ballot being to secure the identification of the ballot brought back by the voter as that which was delivered out to him—the initials used by both these officers were sufficient. The Legislature has shewn its intention, when everything else is found to be regular, not to require great exactness in the matter of the name or initials, by enacting that where the number of ballots which were used is found to be correct, the total absence of name or initials on some of them should not be ground for rejection: sec. 112 (2). There

was no suggestion that the number of ballots found at these polls was not correct, and, that being so, I do not think it would have been right to disallow the votes if none of them had been initialled. However that may be, I think they were sufficiently initialled within the meaning of the statute.

A ballot, No. 3438, at Wood and Medora 17, which had a small pencil marking thereon, which might be taken for the letter "c," was allowed by the deputy returning officer, and I am unable to say he was wrong in allowing it for Bridgland.

Both parties have been partly successful in the appeal. I think it is not a case for costs.

STREET, J.

JULY 9TH, 1902.

TRIAL.

GILLETT v. LUMSDEN.

Trade Mark—"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.

Action to restrain defendants from infringing a trade mark registered in 1877 as "Gillett's Cream Dry Hop Yeast," and the sale of goods under the name "Jersey Cream Yeast" as calculated to deceive purchasers, and lead them to believe that they were purchasing the plaintiff's yeast.

C. A. Masten and J. H. Spence, for plaintiff.

F. C. Cooke, for defendants.

STREET, J.:—I am of opinion that the words "cream yeast" are not the proper subject of a trade mark, being common words of description: *Partlo v. Todd*, 14 A. R. 444, 452; *Provident Chemical Works v. Canada Chemical Co.*, 2 O. L. R. 182, 185.

The plaintiff must, therefore, fail upon the branch of his case which depends upon his ownership of the registered trade mark. I think, however, that he is entitled to succeed upon the ground that his yeast had long ago acquired a reputation in the market under the name of "cream yeast," and that name is his property as against other persons seeking to use it for the purpose of selling other goods of the same character: *Kerly on Trade Marks*, 2nd ed., p. 475. The evidence that he had not for some years before 1901 sold many boxes of the article does not shew an abandonment of the right to use the name in connection with the goods, for he has always been prepared to furnish it in the

few cases between the end of 1894 and the beginning of 1901 when it was asked for: Kerly on Trade Marks, 2nd ed., p. 346.

There should, therefore, be a declaration that the defendants, by using the word "cream," as applied to their yeast, have infringed the plaintiff's rights, and a judgment for a perpetual injunction restraining them from doing so; and the defendants must pay the costs of the action.

MACMAHON, J.

JULY 10TH, 1902.

TRIAL.

STEWART v. WALKER.

Will—Proof of Copy when Original not Produced—Loss or Destruction of Original—Revocation—Evidence—Action to Establish Will—Parties—Administrator Pendente Lite.

Action to establish the will of the late John A. McLaren, of Perth, who died in January, 1902

The deceased was illegitimate, and after his death a will said to have been made by him four years before could not be found, and no original testamentary document could be found or produced, and it was alleged by the Attorney-General for the Province of Ontario, and by a sister of the deceased, the defendant Eliza McIntyre, that McLaren died intestate, and that, by reason of his illegitimacy, all his property escheated to the Crown, and a declaration was accordingly claimed by the Attorney-General as to the vesting of the property in the Crown.

The plaintiff was a nephew of Mr. McLaren, and it was shewn that he was and had been for many years the especial favourite of Mr. McLaren. The plaintiff alleged that four years ago a will had been drawn for Mr. McLaren, under his instructions, by which certain bequests were made to the defendants, being his brothers and sisters, and to Mr. Walker, who was his confidential bookkeeper, and to Miss Hamilton, and that, after such specific bequests, the whole of the residue of the estate was by the will given to the plaintiff. A copy of the will was made at the time of the execution of the original, and this copy was produced at the trial of the action. It was contended by the Attorney-General and by the defendant Eliza McIntyre, who was a sister, that the will referred to had been revoked, and that another will had been made; and a large amount of evidence was given at the trial on the question of revocation or intention to revoke the will which was made in plaintiff's favour.

G. H. Watson, K.C., for plaintiff.

S. H. Blake, K.C., E. G. Malloch, K.C., A. C. Shaw, Perth, and J. M. Balderson, Perth, for the defendants Walker, Barbara Stewart, and the Cleveland Stewarts.

W. R. Riddell, K.C., for defendant Minnie Hamilton.

J. Lorn McDougall, Ottawa, for defendant Eliza McIntyre.

G. F. Shepley, K.C., A. B. Aylesworth, K.C., and J. A. Allan, Perth, for the Attorney-General.

MACMAHON, J. (after an exhaustive review of the evidence and reference to *Sugden v. Lord St. Leonards*, 1 P. D. at pp. 76, 201, 203, 224, 225, 232; *Poulton v. Poulton*, 1 Sw. & Tr. 55; *Finch v. Finch*, 1 P. D. 371; *Battyll v. Lyles*, 4 Jur. 718; *Allen v. Morrison*, 17 N. Z. L. R. 678, [1900] A. C. 604, concluded):—There is not in this case, as there was in *Allen v. Morrison*, a presumption against the hypothesis of fraudulent abstraction. There is here, as there was in *Finch v. Finch*, *Battyll v. Lyles*, and *Sugden v. Lord St. Leonards*, evidence from which a strong inference arises that the will was fraudulently abstracted by the person (the defendant Eliza McIntyre) who declared almost immediately after the death of the testator that she had in her possession his private papers, which she said would prevent the Stewarts handling a dollar of McLaren's money.

But, although on the evidence this inference may be drawn, yet, for the reasons stated in *Finch v. Finch*, the Court is not bound to come to a conclusion one way or the other on that question.

McLaren during his last illness gave directions to the plaintiff as to the management of some of the more important matters connected with his business. He knew his illness was of a serious nature, and, had he not thought the will was still in existence, he was fully capable of giving instructions for a new will, unless he had changed his mind, and intended that the Government should, by his intestacy, become possessed of his whole estate.

The evidence satisfies me that there was no change of mind in the testator towards the beneficiaries named in the will, and from the expressions used by him up to a late period of his life his determination not to die intestate remained unaltered.

The testator was a man of education and excellent business capacity, and had full knowledge of the contents of his will, and approved of the same. There was no evidence of undue influence by the plaintiff, his solicitor, who drew the will. The provisions contained in the will emanated

wholly from the testator, and were dictated by him. And from the evidence, I conclude he was not a man who would be influenced as to the disposition of his property by the plaintiff or any one else.

Before the trial commenced counsel for the Attorney-General urged that the National Trust Company, which had been by consent appointed administrator pendente lite of the estate, real and personal, of John A. McLaren, was a necessary party to the suit.

Mr. Aylesworth cited two cases in support of his contention, viz., *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294, and *Weiland v. Bird*, [1894] P. 262. In *Dowdeswell v. Dowdeswell*, where the object of the suit was to establish the title of the plaintiff as the sole next of kin, it was held that a general administrator of the testator's estate was a necessary party to the suit, and not an administrator ad litem. There is no reference whatever in the case to an administrator pendente lite. In *Weiland v. Bird* the only question was as to when the functions of an administrator pendente lite terminated, and it was decided that they terminated with a decree pronouncing in favour of a will with executors. The President (Sir Francis Jeune) said:—"After that (the decree) the position is the same as if there never had been a lis, and as if a testator had died leaving an undisputed will, with executors."

Wharton's Law Lexicon says:—"Administration pendente lite is granted where a suit is commenced in the Probate Court concerning the validity of a will or the right to administration, until the suit be determined, in order that there may be somebody to take care of the testator's estate."

In England, by an amendment to the Probate Act, 20 & 21 Vict. ch. 77, sec. 70, it is provided that, "pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person: and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court, and act under its direction."

Under this Act, an administrator pendente lite may be appointed at the instance of a creditor who is not a party to the suit: *Tichborne v. Tichborne*, 1 P. & D. 730.

The administrator pendente lite is not a necessary party to the suit.

There will be judgment declaring that the late John Alexander McLaren duly executed and published his last will, as set out in the 5th paragraph of the statement of claim, and that the plaintiff, as executor of said last will (a true copy of which was produced at the trial, and marked as exhibit 3), is entitled to propound the same, and to have probate thereof issued to him.

The costs of all the parties, except of the defendants Eliza McIntyre and the Attorney-General, to be paid out of the estate. The plaintiff is entitled to costs as between solicitor and client.

The defendant Eliza McIntyre must bear her own costs. The Crown is only entitled to costs where there is something coming to it out of the estate: *Perkins v. Bradley*, 1 Ha. 219; *Morgan on Costs*, 2nd ed., p. 337.

JULY 12TH, 1902.

DIVISIONAL COURT.

MCINTYRE v. TOWN OF LINDSAY.

Way—Non-repair—Injury to Person—Municipal Corporation—Trench Dug by Gas Company—Consent of Corporation—Liability of Both—Relief Over.

Appeal by plaintiff from judgment of County Court of Victoria dismissing the action as against the town corporation with costs. The action was brought against the town corporation and the Lindsay Gas Company to recover damages for injuries sustained by plaintiff on the night of the 9th October, 1901, by stepping into a deep trench dug by the defendant company along one of the streets of the town. Judgment was entered for plaintiff against the company for \$75 and costs. The company had been authorized by a by-law of the town council to lay down their mains along the streets of the town, they agreeing to indemnify the corporation for all damages to arise therefrom, and to properly protect and warn the public against accidents by lights. At the same time that the gas company had opened a trench at the point in question, the town corporation were laying a granolithic walk, and had erected a barrier round the walk usually used by pedestrians. The plaintiff was turned out of the usual path by this barrier, and slipped in the dark into the ditch and was injured. Neither of the defendants

had put up any lights at the point in question, and the street itself was dark. On previous nights the gas company had hung lamps along the excavation to warn persons of its existence.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

William Steers, Lindsay, for plaintiff.

H. L. Drayton, for defendants.

STREET, J.:—The action was properly brought against both the town corporation, whose duty it was to keep the highway in repair, and the gas company, who had dug the trench: *Stilliway v. City of Toronto*, 20 O. R. 98. An absolute duty was cast upon the town corporation by sec. 606 of the Municipal Act to keep the highway in repair, and they could not divest themselves of this duty by requiring the gas company to assume it. The gas company had no right to dig up the highway without the authority of the by-law passed by the council, and in giving that authority the town corporation did not free itself from its statutory liability. Section 611 does not apply, because the gas company was acting with the consent and license of the corporation. The evidence shews that the highway was out of repair to the knowledge of the town corporation, and that the accident was caused by such non-repair and by the negligence of both defendants to see that the trench was lighted.

Appeal allowed, and judgment to be entered for plaintiff against both defendants for \$75 with costs. The town corporation to have judgment over against the gas company for the amount so recovered and the costs of the plaintiff and of the town's defence. The plaintiff to be paid the costs of this appeal by the town corporation, but the town corporation should not recover these costs from the gas company. No costs of appeal to gas company.

FALCONBRIDGE, C.J., concurred, and referred to and distinguished *Dallas v. Town of St. Louis*, 32 S. C. R. 120.

BRITTON, J., concurred.

William Steers, Midland, solicitor for plaintiff.

G. H. Hopkins, Lindsay, solicitor for defendant corporation.

Hugh O'Leary, Lindsay, solicitor for defendant company.

JUNE 28TH, 1902.

C. A.

McDONELL v. CITY OF TORONTO.

*Assessment and Taxes—Local Improvement Rates—Charge on Land—
Distress—Invalid By-law—Validating Statute—Effect of—Frontage Tax—Special Rate.*

Appeal by plaintiff from judgment of ROBERTSON, J., dismissing the action. The plaintiff claimed a declaration that the assessment of plaintiff's property for local improvements (part of the cost of opening up Sunnyside avenue, in the city of Toronto) for the years 1892, 1893, 1894, 1896, and 1897, was illegal and void; that the defendants had no right to distrain for such taxes; and that they had now no right to collect such taxes by action or in any other way; and that such taxes did not form a charge on plaintiff's lands fronting on Indian road.

On 12th January, 1892, \$36,517.77 was required to be raised by the issue of debentures to pay for the opening and construction of Sunnyside avenue, and the city engineer having submitted a description of the property that would be benefited by such opening, as recommended on the initiative, the defendants' counsel on 1st February, 1892, passed by-law No. 3012 to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Sunnyside avenue. The by-law imposed a special rate of 34 cents and 8 mills on the real property described in it, according to the frontage thereof, sufficient to produce in each year \$2,687.70, for 20 years. Under this by-law the defendants assessed the plaintiff upon a frontage of 671.3 feet for an annual payment of \$233.60. In passing the by-law and making the assessment the provisions of 53 Vict. ch. 50, sec. 618 (1) and (2), (O.) then in force, were not observed.

By 56 Vict. ch. 85 (O.) this by-law and all debentures issued and to be issued thereunder, and all assessments made were validated and confirmed.

The plaintiff's land was assessed in the assessment rolls for the years 1892 to 1898, inclusive, but she disputed the assessments, and paid no taxes for any of these years.

A bailiff, acting under a warrant from the collector of taxes for 1896 and 1897, on the 17th May, 1899, distrained the plaintiff's goods for \$1,347.77 for taxes therein alleged to be in arrear for 1896 and 1897.

The plaintiff thereupon gave a bond to the defendants reciting that they claimed from her \$1,347.77 for local improvement taxes (and percentages thereon) for 1892, 1893, 1894, 1896, and 1897, for the opening of Sunnyside avenue, and also \$530.63 for like taxes for 1895 and 1898 and interest thereon, and that the plaintiff had, since the taxes for 1892 became payable, asserted that the city had no right to assess such taxes upon her property extending from Sunnyside avenue to Indian road, some portions of which were mortgaged, and that the collector had no right to seize any of her goods for such taxes, and that her lands and goods were not liable therefor, and that it had been arranged that plaintiff should bring an action against defendants to test the right to collect such taxes either by distress or action or in any other way, or to charge them upon the land, the question of the taxes for the two different periods being treated as different issues, which bond contained a condition for making the same void if plaintiff should well and truly prosecute the action and pay whatever might be found due to defendants in respect to the taxes, and costs. The plaintiff agreed not to make any objection on account of the defendants not having included the taxes for 1895 and 1898 in the distress made.

The plaintiff had resided on the land ever since she became the owner of it, in 1886, and had always ample goods on the land out of which the amount of the taxes could have been levied by distress in each year.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.

W. Cassels, K.C., and W. H. Lockhart Gordon, for appellant, plaintiff.

E. D. Armour, K.C., and W. C. Chisholm, for defendants the city corporation.

H. C. Fowler, for defendant Duncan.

ARMOUR, C.J.O.—The provisions of the law governing the proceedings taken in 1892 are to be found in 53 Vict. ch. 50, as amended by 54 Vict. ch. 42.

By-law 3012 was intended to be passed under the authority of sec. 612 (setting it out, and also secs. 613 and 618 (1) and (2)).

No notice was ever given as required by sec. 618 (1) and (2), and no Court of Revision was held, and none of the

parties affected by the proposed assessment had any opportunity of being heard against it; and, notwithstanding this, the Legislature, by what cannot be regarded as other than an abuse of power, validated and confirmed it.

The first question to be determined is whether by-law number 3012 and the assessment made thereunder, validated and confirmed as they were by the Legislature, formed any lien or charge upon the real estate of the plaintiff; and it is only by virtue of sec. 343, R. S. O. 1887 ch. 184, that they could be held to form such lien or charge, which section provides that "Every special assessment made, and every special rate imposed and levied, under any of the provisions of this Act, and all sewer rents and charges for work or services done by the corporation, on default of the owners of real estate, under the provisions of any valid by-law of the council of the said corporation, shall form a lien and charge upon the real estate in respect of which the same shall have been assessed and rated or charged, and shall be collected in the same manner, and with the like remedies, as ordinary taxes upon real estate are collectable under the provisions of the Assessment Act."

In order to the assessment of a valid rate upon the real property fronting or abutting upon Sunnyside avenue for the expense of opening the same the real property so fronting or abutting which was immediately benefited thereby must have been ascertained and determined, for it was upon the real property to be benefited thereby that the special rate was to be assessed, and not upon, but only according to, the frontage thereof. And the proportion in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited must also have been ascertained and determined, and this is made more apparent, if need there was, by the notice required to be given by section 618 (2), shewing the amount of the assessment "on the particular piece of property."

Now, by-law number 3012 did not provide any means of ascertaining and determining what real property would be immediately benefited by the opening of Sunnyside avenue, the expense of which was to be assessed upon the real property to be benefited thereby, nor did it ascertain and determine it, nor did it provide any means of ascertaining and determining the proportions in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited, nor did it ascertain and determine them.

Nor was the real property immediately benefited by the opening of Sunnyside avenue, the expense of which was proposed to be assessed upon the real property benefited thereby, ascertained and determined by the proposed assessment made under the said by-law, nor were the proportions in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited ascertained and determined by the said proposed assessment.

The by-law treats the frontage or front line of the real property fronting or abutting upon Sunnyside avenue as real property, and imposes the special rate thereon instead of imposing it upon the real property fronting or abutting on Sunnyside avenue according to the frontage or front line thereof, when in truth and in fact this frontage or front line of the real property fronting or abutting upon Sunnyside avenue is not real property at all, but a mere mathematical line—length without breadth—and which could not be the subject of a lien or charge within the meaning of sec. 343 above quoted.

And all that was done by the proposed assessment made under the said by-law was to set down the names of the owners of the real property fronting or abutting upon Sunnyside avenue, the frontage of the real property of each so fronting or abutting, the annual payment to be made by each, and the number of each upon the assessment roll for 1892.

. The by-law and proposed assessment thereunder, in my opinion, therefore, formed no lien or charge upon the real estate of the plaintiff, and forming no lien or charge upon it, the validating and confirming by the Legislature of the by-law and assessment created no lien or charge upon it.

The effect, however, in my opinion, of the validating and confirming by the Legislature of the by-law and assessment was to constitute a valid personal assessment of the plaintiff for an annual special rate for twenty years from the first day of January, 1892, of thirty-four cents and eight mills per foot of the frontage of her real property fronting or abutting upon Sunnyside avenue, which frontage is now agreed to be six hundred and twenty-one feet, collectable in the same manner and with the like remedies as ordinary taxes upon real estate are collectable under the provisions of the Assessment Act.

There was no valid reason why this special rate should not have been collected for the years 1892, 1893, 1894, 1895,

and 1898 by the respective collectors for those years respectively, but they neglected their duty in this respect, and the special rate for those years has thus become lost to the defendants: *Caston v. City of Toronto*, 30 O. R. 16, 26 A. R. 259, 30 S. C. R. 397.

The collector's rolls for the years 1896 and 1897 were in the collector's hands, although the time at which they should have been returned had expired, and the seizure by him of the plaintiff's goods for the special rate for those years was, therefore, justifiable: *Newberry v. Stephens*, 16 U. C. R. 65; *Lewis v. Brady*, 17 O. R. 377.

Upon payment, therefore, by the plaintiff of the special rate for the years 1896 and 1897 and the costs of the distress, her bond will be delivered up to be cancelled, and the said by-law and assessment, and the statute validating and confirming the same, will be declared to form no lien or charge upon her real estate.

And as to the costs, there should be no costs of the action to either party, but the plaintiff should have the costs of the appeal.

OSLER and MOSS, JJ.A., wrote opinions to the same effect.

MACLENNAN, J.A., dissenting, gave his reasons in writing.

LISTER, J.A., died while the appeal was *sub judice*.

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STREET, J.

JULY 11TH, 1902.

TRIAL.

NEELY v. PETER.

Water and Watercourses—Injury to Land by Flooding—Claim for Damages—Summary Procedure—Costs of Action—Erection and Maintenance of Dam—Liability of Owners—Tolls—Liability of Lumbermen Using Dam.

Action by the owner of land upon a river against the original defendants for flooding such land by a dam. At the trial it appeared that the dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R. S. O. ch. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants.

/ O. M. Arnold, Bracebridge, for plaintiff.

W. L. Haight, Parry Sound, for defendant.

STREET, J., held, that, although (as decided in *Blair v. Chew*, 21 C. L. T. Occ. N. 404) a plaintiff is not bound to proceed summarily upon a claim such as this, under R. S. O. ch. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by secs. 15 and 16 of R. S. O. ch. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But sec. 1 of R. S. O. ch. 142 places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so, and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by sec. 15 of R. S. O. ch. 194.

The action was dismissed as against the original defendants; and judgment was given for the plaintiff against the added defendants for \$142, but without costs, the defendants having paid that amount into Court.

MEREDITH, C.J.

JULY 14TH, 1902.

WEEKLY COURT.

MORSE v. MORSE.

Trust—Right of Beneficiary to Enforce in Her Own Name—Conveyance.

Motion by plaintiff for judgment in default of defence.

E. F. Gunther, for plaintiff.

No one for defendants.

MEREDITH, C.J., held that *Edmison v. Couch*, 26 A. R. 537, supports the contention that the conveyance mentioned in the statement of claim created an irrevocable trust for plaintiff as to the provision which is made by it for her benefit, enforceable by her in her own name. Judgment so declaring and for the realization of the charge by sale of the lands in question, with costs. No personal judgment for payment, no claim therefor being made. Usual reference to Master in Ordinary, if plaintiff desires a reference.

OSLER, J.A.

JULY 14TH, 1902.

C.A.—CHAMBERS.

RE HALTON PROVINCIAL ELECTION.

NIXON v. BARBER.

Parliamentary Election—Ballot—Straight Mark instead of Cross—Cross not in Compartment—Writing on Ballot—Circular Mark—More than One Cross—Cross with Blue or Indelible Pencil—Evidence.

Appeal by both candidates from the decision of the Judge of the County Court of Halton upon a recount of the votes cast at the general election.

J. W. Elliott, Milton, and Eric N. Armour, for Nixon.

E. F. B. Johnston, K.C., and W. I. Dick, Milton, for Barber.

OSLER, J.A.—The majority for Barber as ascertained by the County Court Judge was 22. On the candidate Nixon's appeal, the following ballots were in question: No. 1, Esquesing, ballot 96; No. 3, Nassagaweya, No. 2523; No. 1, Trafalgar, ballot 4300; South Ward, Milton, ballot 5470. These were all marked with a single stroke for Barber, and were allowed by the County Court Judge. I think that they must be disallowed, as required by the Act and directions. Appeal allowed. The head-note to the West Huron Recount Case, 2 Ont. Elec. Cas. 58, is wrong. It is there stated that ballots marked as above were allowed. The opposite was the case; they were disallowed by the County Court Judge, and his ruling was affirmed.

No. 6, Esquesing, ballot 954, marked with a cross in Nixon's compartment, clear and well defined, and also a cross quite plain in Barber's compartment. The latter is fainter, and the paper surrounding it has a slightly clouded appearance which might be described as a smudge caused by rubbing the finger over it. The deputy returning officer and County Court Judge have not allowed this ballot for Nixon, treating it as one marked for both candidates. From an inspection of the ballot, it cannot be said with certainty that they were wrong. I dismiss the appeal as to this.

No. 1, Burlington, ballot 3472, marked for Barber and counted by the County Court Judge. This ballot has the name "Barber" written upon it. I think, having regard to the West Huron case, *supra*, and the recent decision of MacLennan, J.A., in the Lennox and North Grey cases, ante, pp. 472, 474, that this is not a good ballot. I allow the appeal as to this.

No. 4, Trafalgar, ballot 4380, marked with a clear cross on the right of the margin below the lower line of Nixon's compartment, as defined by lines on the ballot paper. This was rejected by the County Court Judge, but is claimed for Nixon. I think, having regard to the recent decision of MacLennan, J.A., in the Lennox case, *supra*, that the ballot should be counted for Nixon. I allow the appeal as to this.

No. 3, Trafalgar, ballot 4619, allowed by deputy returning officer for Nixon, but rejected by the County Court Judge, on the ground that it is clearly marked for both candidates. The upper cross in Barber's compartment is fainter than the one in Nixon's, but it is an unmistakable intentional cross. I think that the County Court Judge was right. I dismiss appeal as to this.

No. 3, Nassagaweya, ballot 2527, marked with a circle, naught, in Barber's compartment and a deformed circle in Nixon's. Treated by the deputy returning officer and County Court Judge as a spoiled one, not marked with a cross in Nixon's compartment. I think this was a spoiled ballot. I dismiss appeal as to this.

No. 6, Esquesing, ballot 1015, and No. 3, Trafalgar, ballot 4717, marked with a cross in Barber's compartment and a line in Nixon's. This was counted by County Court Judge for Barber. The Judge below was right. I dismiss appeal as to this.

On the candidate Barber's appeal:—No. 3, Trafalgar, ballot 4596, and No. 5, Trafalgar, ballot 5044, counted by County Court Judge for Nixon. Barber's appeal dismissed.

No. 1, Acton, ballot 1585, marked with a clear cross for Nixon and so allowed by County Court Judge. There is a faint mark in the upper or Barber's compartment which is said to be a cross, and to have the effect of spoiling the ballot. I think that the mark has every appearance of being an inadvertent one. I dismiss appeal as to this.

No. 3, Esquesing, ballot 449, allowed by the County Court Judge for Nixon. There are two plain strokes united at the top and forming an inverted V plainly, though not very widely apart at the bottom. I think that enough appeared to shew that the voter meant to make a cross and not a single straight stroke. I dismiss appeal.

No. 3, Esquesing, ballot 413, allowed by the deputy returning officer and County Court Judge for Nixon, marked with three clear crosses in a line for Nixon. This is a good ballot. I dismiss appeal as to it. Monck Case, H. E. C. 735, and Bothwell Case, 8 S. C. R. 718, 719, followed.

No. 1, Nassagaweya, ballot 2048, marked and counted for Nixon. I think that the cross, though clumsy and ill-made, is well enough for a ballot. I dismiss appeal as to this.

No. 3, Oakville, ballots 4058, 4073, 4077, 4098, 4099, rejected by the deputy returning officer, but counted by the County Court Judge for Nixon. Each is well marked with a plain cross in Nixon's compartment. The cross is made with blue or indelible, or at least not with a common black pencil, and the ballots are objected to as offending against the requirements of sec. 31 (3) and 71 of the Election Act, not being marked with the pencil provided by the deputy returning officer for the use of voters, and thus shewing marks of some common design to disclose the identity of the voter. I think that on an inquiry of this kind evidence cannot be received by the Judge; he deals with the ballots in the condition in which they come before him. There is nothing to shew that the pencil with which these ballots were marked was not supplied by the deputy returning officer, nor to shew on what ground he rejected the ballots. Appeal dismissed.

The certificate will be according to these findings. No costs.

OSLER, J.A.

JULY 14TH, 1902.

C. A.—CHAMBERS.

RE CENTRE BRUCE PROVINCIAL ELECTION.

STEWART v. CLARK.

Parliamentary Election—Petition—Clerical Error—Service—Formal Objection—Amendment.

Motion by respondent to set aside copy and service of the petition.

E. Bristol, for respondent.

A. B. Aylesworth, K.C., for petitioners.

OSLER, J.A.—A petition regular in form was duly presented by the defeated candidate. Notice of the presentation was duly served on the respondent, and, together therewith, a paper purporting to be a copy of the petition. By some error on the part of a clerk, a pen was run through the last clause of the copy—the prayer of the petition—which was served in that condition. The respondent moves to set aside copy and service. The petitioner, while contending that nothing is wrong, moves to amend. If the pen stroke through the final clause of the printed copy of the

petition is intended to signify its deletion, as I suppose must be taken to be the case, the paper served is undoubtedly not a true or complete copy of the petition. Nevertheless, the respondent is not left in any uncertainty as to the relief claimed as appropriate to the long string of charges set forth in the petition, and I cannot see that he is prejudiced in the least by the omission he complains of, irregular as it is. Mr. Bristol argued very earnestly that the slip was fatal, and could not be amended, relying upon such cases as *Williams v. Mayor of Tenby*, 5 C. P. D. 135; *Lisgar Election Case*, 20 S. C. R. 1; *Burrard Election Case*, 31 S. C. R. 459; and other cases in which it has been held that a petition cannot be amended by the addition of a new or further ground for avoiding the election, or the entire omission of some statutory condition or preliminary, cured. These cases, however, are not analogous to the case in hand. There was in them either the attempt to set up at too late a period some special ground for avoiding the election, or the clear absolute omission to do something which the statute required to be done, e.g., to give notice of the presentation of the petition, or to leave a copy of it within the prescribed time for the returning officer, an essential part, as Ritchie, C.J., said in the *Lisgar Case*, of the presentation or filing of the petition. The objection taken here is, under the circumstances, a purely formal one, to which by Rule 60 no effect ought to be given, and I see nothing in the Act which forbids the exercise of the powers of the Court under sec. 2 (1) of the *Controverted Elections Act* to cure it by amending the copy served (which is before me) just as a defect in the copy of a summons in an action in the High Court may be amended. The petitioner must pay the costs of the application, which are to be the respondent in any event of the cause, and over and above any costs which may be awarded to him at the trial.

MACLENNAN, J.A.

JULY 19TH, 1902.

C. A.—CHAMBERS.

RE STORMONT PROVINCIAL ELECTION.

McLAUGHLIN v. McCART.

Parliamentary Election—Petition—Status of Petitioner—Statement of Right to Petition—What is Sufficient—Defeated Candidate.

Application by respondent to set aside petition, and to remove same from files of Court, on the ground, amongst others, that the petition did not contain a statement of the right of the petitioner to petition, as defined by the *Election Acts*.

J. H. Moss, for respondent.

I. F. Hellmuth, K.C., and E. Bayly, for petitioner.

MACLENNAN, J.A.—I am of opinion that the motion should be refused, but without costs.

The motion is by the respondent to set aside the petition and to remove it from the files on several grounds, only one of which was insisted on before me. That was that the petition did not contain a statement of the right of the petitioner to petition, as defined by the Election Acts.

The Act 62 Vict. (2) ch. 6, sec. 1, enacts that a petition may be presented by any one or more of the following classes of persons:—

- (a) Some person who was a candidate at such election; or
- (b) Three persons who voted or who had a right to vote at such election, and who are severally rated on the last revised assessment roll in respect of real property in the municipality in which they reside, for at least \$1,000.

Rule II. of this Court relating to elections declares that an election petition shall contain the following statement among others :

- (a) The right of the petitioner to petition as defined by the said Act.

Rule LX. declares that no proceeding under the Ontario Controverted Elections Act shall be defeated by any formal objection.

Section 112 (2) of R. S. O. ch. 11 declares that the rules shall be of the same force as if they were enacted in the body of the Act.

The petition, to the end of the first two paragraphs, is as follows:

Petition of John McLaughlin, of the township of Roxborough, in the county of Stormont, farmer, whose name is subscribed.

1. Your petitioner is a person who had a right to vote and who voted at the election above mentioned, and who is rated on the last revised assessment roll in respect of real property in the municipalities in which I reside for at least \$1,000.

2. Your petitioner states that the said election was held on the 22nd day of May, A.D. 1902, and the 29th day of May, 1902, when John McLaughlin, of the township of Roxborough, in the county of Stormont, farmer, and William McCart, of the township of Roxborough, in the county of Stormont, were candidates, and the returning officer has returned the said William McCart as being duly elected.

It is not disputed that the petitioner John McLaughlin is the same person who was the defeated candidate at the election; and if the question had depended on the statute alone, that fact would be sufficient to support the petition, for the statute says it may be presented by a person who was a candidate.

The rule, however, goes further, and requires the petition to contain a statement of the right of the petitioner to petition as defined by the Act. In the present case the petitioner's right to petition is the fact that he was a candidate at the election.

The question is, does this petition contain a statement of that fact?

I think it does contain a sufficient statement of that fact. The petitioner is John McLaughlin, of the township of Roxborough, farmer, and it states that John McLaughlin, of the township of Roxborough, farmer, was one of the candidates at the election. I think that, reading the document alone, the petitioner and the candidate, upon a fair construction of it, must be taken to be one and the same person. There might be a latent ambiguity, but none is shewn, the other John McLaughlin in the constituency residing in a different township and being of a different occupation.

I dismiss the motion, but without costs, as I think the petition not carefully drawn, whereby the motion was invited.

See *Re Centre Bruce*, lately before Mr. Justice Osler (ante, p. 503).

FALCONBRIDGE, C.J.

JULY 15TH, 1902.

CHAMBERS.

HEPBURN v. VANHORNE.

Judgment Debtor—Examination of—Unsatisfactory Answers—Preference—Committal.

Motion by plaintiff under Rule 907 to commit defendant for unsatisfactory answers upon his examination as a judgment debtor.

J. H. Moss, for plaintiff.

W. E. Middleton, for defendant.

FALCONBRIDGE, C.J., held that the debtor had not refused to answer, nor had he so equivocated as to render his answers not "satisfactory" answers. He had made a pretty full disclosure of what he had done. On his own shewing he had preferred his wife to other creditors, and to plaintiff

in particular, but no case referred to would justify a holding on this evidence that his preference was fraudulent, so as to make it "appear that" he "has concealed or made away with his property in order to defeat or defraud his creditors."

Motion refused without costs.

MEREDITH, C.J.

JULY 15TH, 1902.

CHAMBERS:

PENNINGTON v. HONSINGER.

Costs—Taxation—Evidence—Brief of, Used by Counsel for Opposite Party.

Appeal by defendants from allowance by the senior taxing officer, on the taxation of the plaintiff's costs, of the charge for brief for senior counsel on the argument of an appeal to a Divisional Court. Senior counsel was retained by plaintiff for the argument in the Divisional Court, and the brief in question was prepared for and handed to him, but, owing to the intricacy of the case and his other engagements, the counsel who was retained was unable to argue the case, and returned the brief to the plaintiff's solicitor, who acted alone as counsel for the plaintiff on the argument. When the appeal came on to be heard, counsel for defendants had not been furnished with any brief of the evidence, and after the appeal had been opened it was found to be impracticable on that account to conclude the argument, and at the suggestion of the Court the plaintiff's counsel handed the brief in question to counsel for defendants, in order that he might, when the argument was resumed on the following day, be prepared with reference to the parts of the evidence on which he relied in argument. Counsel for defendants made use of the brief for this purpose, and retained and still retains it. Under these circumstances the taxing officer allowed the plaintiff so much of the brief as consisted of the copy of the evidence.

W. J. Tremear, for defendants.

Shirley Denison, for plaintiff.

MEREDITH, C.J., held that the allowance made by the taxing officer was correct.

Appeal dismissed with costs.

MEREDITH, C.J.

JULY 15TH, 1902.

WEEKLY COURT.

RE PUBLISHERS' SYNDICATE.

HART'S CASE.

Company—Winding-up—Shares—Allotment—Contributory.

Appeal by T. S. Hart from an order of a special referee settling appellant on the list of contributories for \$300 in respect of five shares in the Publishers' Syndicate, Limited, a company which is being wound up under R. S. O. ch. 129 and the amendments thereto. As to one of the five shares there was no contest; it was fully paid up, and a stock certificate for it was issued and sent to the appellant. The application for the other four shares was made on 26th July, 1900, and they were allotted to appellant on the same day. No formal written notice of the allotment was shewn to have been given to the appellant; but letters were written to him by the company demanding payment on account of the shares, and personal applications for payment were made to him.

Gideon Grant, for appellant.

C. D. Scott, for liquidator.

MEREDITH C. J., held that the letters and what took place when the personal applications were made were sufficient to justify the conclusion that the appellant knew that the company had accepted his application for the shares and had treated him as a shareholder accordingly, which is enough to constitute a complete agreement. In re Universal Banking Corporation, Gunn's Case, L. R. 3 Ch. 40, referred to. Appeal dismissed with costs.

BOYD, C.

JULY 15TH, 1902.

WEEKLY COURT.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Contract—Electric Light—"Unforeseen Accident Through no Default of Company"—Breach—Damages.

Appeal by plaintiffs and cross-appeal by defendants from report of local Master at Ottawa, heard at the Ottawa Weekly Court. The reference was for trial of the action, which was brought to recover \$18,669.50 for electric lamps and lighting, under a contract with the defendants. The controversy was as to the legal relationship of the parties in consequence of the destruction of the works of plaintiffs, in common with a large part of the city of Ottawa, by the

great fire in April, 1900. The result was, as found by the Master, that the city was left without electric light from the plaintiffs for a long period, and, though due diligence was used in the restoration of the works, for a further considerable period there was but a partial supply of light by plaintiffs.

G. F. Henderson, Ottawa, for plaintiffs.

T. McVeity, Ottawa, for defendants.

BOYD, C.:—It was well found by the Master that this was "an unforeseen accident, not occurring through any default of the company"—a contingency provided for in these terms by the agreement between the parties. The solution of the difficulty with regard to the non-lighting during this period depends upon the construction of the 7th clause of that part of the agreement which embraces covenants and conditions. This group of clauses is preceded by the declaration: "It is hereby covenanted and agreed between the said parties hereto as follows, and these presents are on the express conditions." The 7th clause provides that the company shall at all times keep lighted the lamps at their own cost, unless when prevented by some unforeseen accident, not occurring through any default of the company, but in any event the company shall pay 50 cents for each night for each lamp that is not kept lighted to the satisfaction of the superintendent of fire alarms, whose report is to be final and conclusive as to the number of lamps not kept lighted by the company, according to the terms of this agreement. The Master held that the company were to be paid the contract price for the period when no light was furnished, and that the city was entitled to deduct therefrom penalties liquidated at 50 cents for each unlighted lamp during the same period. I read the contract as meaning that if no light was furnished from unforeseen accident, there was to be no pay and no penalty during such time; when light began to be furnished, then pay began *quo tanto*—the company all the while being in no default.

Appeal of plaintiffs allowed with costs, and appeal of defendants dismissed with costs.

MEREDITH, C.J.

JULY 15TH, 1902.

CHAMBERS.

RE THOMSON v. STONE.

County Court—Jurisdiction—Action by Division Court Judgment Creditor for \$92 to Set Aside Chattel Mortgage for \$520—Subject-matter Involved.

Motion by defendants for an order prohibiting (after

judgment) further proceedings in this action in the County Court of York, on the ground that the subject-matter involved in the action is not within the jurisdiction of that Court. The action was by a Division Court judgment creditor of defendant Charles E. Stone (for \$92.05 and costs) to set aside as fraudulent as against the plaintiff a chattel mortgage for \$520 made by that defendant to his wife, the other defendant.

John MacGregor, for defendants, contended that, the mortgage being for a greater sum than \$200, and the value of the goods conveyed by it being (as he contended was shewn) greater than \$200, the County Court had no jurisdiction.

B. E. Swayzie, for plaintiff.

MEREDITH, C. J., held, following *Forrest v. Laycock*, 18 Gr. 611, and distinguishing *Dominion Bank v. Heffernan*, 11 P. R. 504, and *Re Lyons*, 10 P. R. 150, that the subject-matter involved in an action such as this must be taken to be the amount due on the judgment in respect of which equitable relief is sought. Motion dismissed with costs.

MEREDITH, C.J.

JULY 15TH, 1902.

CHAMBERS.

McGILLIVRAY v. WILLIAMS.

Lis Pendens—Vacating—Ex Parte Application of Plaintiff—Judicature Act, secs. 98, 99.

Appeal by defendant from order of local Judge at London vacating (on an ex parte application by plaintiff) the certificate of *lis pendens* registered by him, and on application by defendant to vacate the registration of the order.

F. A. Anglin, for defendant.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., held, that the registration of the certificate of *lis pendens* was a proceeding taken by plaintiff for his own benefit and protection, which he might get rid of whenever he saw fit, and also that secs. 98 and 99 of the Judicature Act are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered.

Appeal and motion dismissed with costs.

JULY 18TH, 1902.

DIVISIONAL COURT.

STACK v. T. EATON CO.

Fixtures—Shop Fittings—When so Annexed to Land as to Pass to Purchaser on Conveyance.

Appeal by plaintiff from judgment of MACMAHON, J., dismissing an action brought to decide the ownership of certain shop and gas and electric light fittings which were placed by one Guinane in a building on freehold land then owned by Guinane and which the respondents, purchasers of the land, claimed as having passed to them as part of the realty by the conveyance of the land to them. The shop fittings consisted of shelving made in sections, screwed to brackets affixed to the wall of the building, readily removable without damage either to the fittings themselves or to the building; and the gas and electric fittings were also removable by unscrewing without injury to the building.

W. R. Smyth, for the appellant.

G. F. Shepley, K.C., for the respondents.

MEREDITH, C.J.—I take it to be settled law:

1. That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

2. That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels:

3. That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.

4. That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

5. That even tenants' fixtures, put in for the purposes of trade, form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

I am unable to see why the shelving affixed by Guinane when he was the owner of the freehold for the purposes of

the business he carried on there, is not to be deemed a part of the land, and I can see nothing in the degree or object of the annexation of it to lead to the conclusion that such an intention existed as is necessary to alter the *prima facie* character of the article arising from the fact of its being affixed, but the contrary.

The title to the gas and the electric light fittings is, as it seems to me, to be determined by the same considerations, which lead necessarily, I think, to the conclusion that when affixed as they were they became part of the land, and passed by the conveyance of it to the respondents. I see no reason for differing from *Argles v. McMath*, 26 O. R. at p. 248.

The appeal, in my opinion, fails, and should be dismissed with costs.

LOUNT, J., concurred.

The following cases were cited: *Bain v. Brand*, 1 App. Cas. at pp. 762, 772; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Haggert v. Brampton*, 28 S. C. R. 174; *Argles v. McMath*, 26 O. R. at p. 248.

MACMAHON, J.

JULY 17TH, 1902.

WEEKLY COURT.

MORROW v. PETERBOROUGH WATER CO.

Company—Voluntary Winding-up—Surplus Assets—Distribution—Second Preference Shareholders—Ordinary Shareholders—Fully and Partly Paid Shares—By-laws and Resolutions—Profits.

Action on behalf of plaintiff and all other holders of partly paid shares of the stock of the defendant company to recover a distributive share of certain moneys in the hands of the company.

A special case was stated, shewing that the company was incorporated in 1881 by registration under R. S. O. 1877 ch. 157, for the purpose of supplying the town of Peterborough with water. The nominal capital stock was \$200,000, divided into 10,000 shares of the par value of \$20 each. The working capital was made up as follows:

- 1,000 shares first preference 5 per cent. stock subscribed and fully paid.
- 1,250 shares second preference stock subscribed and fully paid.
- 1,452 shares common stock subscribed and fully paid up.
- 25 shares common stock subscribed and paid up to the extent of 60 per cent.

3,444 shares common stock subscribed and paid up to the extent of 55 per cent.

175 shares common stock subscribed and paid up to the extent of 35 per cent.

The plaintiff was the owner of 117 shares of common stock on which 55 per cent. had been paid. The first preference shares were issued pursuant to by-law 26 of the company, and were wholly subscribed for by the directors of the company in trust for the company, and no claim in respect thereof was made to the moneys in question. On the 31st January, 1902, all the property, franchises, etc., of the company were sold to the corporation of the town of Peterborough for \$230,000, under the provisions of the Municipal Waterworks Act, and it became impossible for the company to continue its business.

(9) The second preference stock was created and issued pursuant to by-law 27 of the company, passed 16th April, 1895, which by-law provided that such second preference stock should be subject only to the first preference stock issued and subscribed under by-law No. 26, and should have preference and priority over all other stock of the company theretofore created or issued or which should thereafter be created or issued, in the respects following:

(a) Dividends on such preference stock at the rate of 6 per cent. per annum, to be computed from the date such stock should be subscribed for and allotted, were to be paid out of the net profits of the company before any dividends on ordinary stock; and for a period not to exceed five years from 15th April, 1895, the holders thereof should not be entitled to participate further in the profits of the company; in case of default of any such payment, then the deficiency should be paid out of the net profits of succeeding years, and no dividend should be declared or paid on the ordinary capital stock of the company until such deficiency should be fully paid.

(b) On 15th April, 1900, or any subsequent year, the holders of such preference stock should be entitled to surrender the same and receive in lieu thereof the par value, or at their option to surrender the same and receive in lieu the corresponding amount of shares of the ordinary capital stock of the company.

No surrender had ever been made by any of the holders of the second preference stock.

(10) By-law 27 further provided that in the event of the company being wound up, if any surplus of the capital assets was to be returned to shareholders, the holders of the second preference stock should be entitled to have the full nominal value of their shares, and all dividends thereof up to that date, returned and paid to them before any return of capital in respect of ordinary stock; and, subject thereto and to the first preference stock, the holders of the ordinary shares should be entitled to such surplus of the capital assets.

(12) The full nominal amount of the second preference stock and all dividends thereof up to 31st January, 1902, were duly tendered to the holders of such stock, and were accepted by them.

(16) The amount paid in by the holders of ordinary stock were returned and paid to them, with interest to 31st January, 1902.

(17) After providing for all the liabilities of the company, the return of all share capital, and the payment of dividends as above, there remained in the bank to the credit of the company a surplus of \$19,039.24.

The question for the opinion of the Court was: In what proportion or proportions were these surplus moneys distributable among the shareholders other than the holders of the first preference shares?

G. F. Shepley, K.C., for plaintiff.

R. E. Wood, Peterborough, for defendants Rogers and Lewis.

L. M. Hayes, Peterborough, for defendant Collins.

C. H. Bradburn, Peterborough, for defendant company.

MACMAHON, J.—No language could more clearly provide for exclusion of the second preference stockholders from participating in the surplus assets than that employed in the concluding words of the part of the by-law set out in paragraph 10 of the special case. Had the second preference stockholders not thus been contracted out of participation in the surplus assets, they might have been entitled to share therein with the holders of ordinary stock. [Reference to *Birch v. Cropper*, *In re Bridgewater Navigation Co.*, 14 App. Cas. 525.] The second preference shareholders are not entitled to share in the surplus assets.

The remaining question is: How are the surplus assets to be distributed amongst the holders of the ordinary stock? Some of such shareholders had fully paid up their shares;

others had paid 60 per cent.; some 55 per cent., and some only 35 per cent., on their shares. It was urged by counsel for the holders of fully paid up shares that the surplus assets should be distributed amongst the members in proportion to the capital paid on the shares held by them. In some cases the articles of association of a company make provision that on the winding-up the surplus assets shall be so divided, as was done in *In re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 323, and *In re Mutoscope and Biograph Syndicate*, [1899] 1 Ch. 896, and when that is the case the principle of distribution thus provided for must be carried out.

The only provision made by the Peterborough Water Company for the distribution of the assets was by a resolution passed at a general meeting of the shareholders of the company on the 2nd March, 1900, which, after providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on the respective shares, and dividends thereon to 31st January, 1902, and after payment of the liabilities and the costs of winding-up, etc., directs that "the surplus at the credit of the company's account in the bank be distributed amongst the members according to their rights and interests in the company." This resolution was, no doubt, framed from the English Companies Act, 1862, sec. 133.

Where the articles of association or regulations (resolutions) of a company do not provide for the distribution of the assets on the winding-up of a company, then, as stated by Mr. Buckley in his work on Companies, 7th ed., p. 322: "If the surplus assets are sufficient to repay every member his capital in full and leave a surplus, such surplus, except so far as it consists of undivided profit, forms part of the joint stock which at the winding-up represented the capital, and, in the absence of provision to the contrary, is divisible among all the members in proportion to their interests in capital, that is, in proportion to the amount of their shares, not to the amounts paid on their shares." [Reference again to *Birch v. Cropper*, supra.]

I have just a word to say respecting the sum of \$5,279.64, which appeared as the net amount carried on the 31st December, 1901. Mr. Wood contended that this sum, being the profits for the year, should have been distributed as dividends among the shareholders, and formed no part of and should not have been included as part of the surplus assets for distribution under the winding-up. The admission in

the special case (paragraph 13) is that on the 31st December, 1901, there remained only \$2,075.13 on hand, and this sum is, I find, included as part of the receipts in a statement of receipts and payments of the Peterborough Water Company from 1st January to 16th June, 1902. That and other receipts of the company were expended between those dates in payment of liabilities of the company.

All the stockholders, both second preference and the holders of ordinary shares of stock, having had returned to them the amount paid in by them on their shares, together with the dividends payable thereon up to the period of distribution, and all the debts and liabilities having been paid, I direct that, after payment out of the surplus assets on hand of the costs of all parties of this motion, the remaining assets of the company be distributed among all the holders of the ordinary stock of the company in proportion to their shares.

FALCONBRIDGE, C.J.

JULY 28TH, 1902.

TRIAL.

WHITESELL v. REECE.

Tenant for Life—Waste—Cutting Timber—Remaindermen—Injunction—Payments by Tenant for Life on Mortgage—Subrogation.

Action by the persons entitled under the will of G. Sealey, deceased, to an estate in remainder in certain lands in the township of Bayham, against the life tenant and the purchaser from her, to restrain waste by cutting timber, etc. The land in question was devised to the tenant for life subject to a mortgage made by testator to trustees to secure annual payments of \$200 to testator's wife during her lifetime.

D. J. Donahue, K.C., and W. E. Stevens, Aylmer, for plaintiffs.

J. A. Robinson, St. Thomas, for defendants.

FALCONBRIDGE, C.J.—The life tenant, defendant Reece, has kept up the payments on this mortgage since testator's death; and recently undertook to sell standing timber on the land to her co-defendant James Payne. Under that agreement defendant Payne proceeded to cut a large quantity of timber until restrained by order and injunction of the Court. The tenant for life claims to be entitled to be subrogated to the rights of testator's widow and of her trustees in respect of and to the extent of the amounts which the tenant for life has paid on the mortgage; and argues that these payments,

or a great proportion of them, ought to be regarded as principal, and that tenant for life is bound, as between herself and the remaindermen, only to keep down the interest, and invokes the doctrine of *Brethour v. Brooke*, 23 O. R. 658, 21 A. R. 144, viz., that where the security is scanty and the interest in arrear, the mortgagee may provide for his own safety by cutting down trees. The present value of the farm is, on the evidence of all the witnesses, not more than \$1,500; but plaintiffs' witnesses swore that, if it had been kept in the same condition as it was in at the time of testator's death, it would be worth \$2,500.

Defendant Reece cannot make the above-stated doctrine applicable to her case. The estate came to her subject to that mortgage. What she has paid on it was paid for her benefit, she no doubt taking chances on the probability of life of an aged woman. If defendant Reece has paid or may pay, under these circumstances, more than the value of the estate, that is her affair; and she is not entitled to any particular consideration, inasmuch as she took under testator's will, besides this land, the bulk of his property. If defendant Reece has, in truth, paid off anything which can be considered as principal, she will be entitled to hold it without interest as a charge on the land as against the remaindermen, under *Macklem v. Cummings*, 7 Gr. 318; but this is not the point in question here; and defendant Reece had and has, therefore, no right to commit the acts of waste complained of.

As to amount and value of timber cut, and as to relative condition of the farm fences and buildings now and at time of testator's death, the evidence for plaintiffs is far superior to that offered by defendants, both in quantity and quality; and it is also quite clear upon the evidence that defendants cannot shelter themselves under *Drake v. Wigle*, 24 C. P. 405, for I find that the timber was not cut down for the purpose of bringing the land under cultivation, nor was it done in conformity with good husbandry, and defendant Reece is not farming the property or making reasonable use of that part of the lot which is supposed to be arable land, and the inheritance is damaged, beyond question, by the acts complained of.

Judgment making injunction perpetual, and awarding plaintiffs \$400 damages, and full costs of suit. Stay of proceedings for 30 days, except as to the injunction; and if within that time defendant Reece shall pay \$400 into Court, she may have the interest thereon paid to her during her life; on her death the principal to be paid out to the plaintiffs.

FALCONBRIDGE, C.J.

JULY 29TH, 1902.

TRIAL.

LACHANCE v. LACHANCE.

Costs—Plaintiff Successful at Trial—Costs as of Motion for Judgment Only.

Action for recovery of dower and for damages for detention. Trial at Sandwich, where judgment was given for plaintiff, costs being reserved.

J. H. Rodd, Windsor, for plaintiff.

J. W. Hanna, Windsor, for defendant.

FALCONBRIDGE, C.J.—The defendant should pay to plaintiff the costs of the action as if judgment were on motion before a single Judge, after pleadings closed, including costs of examination for discovery.

LOUNT, J.

JULY 29TH, 1902.

WEEKLY COURT.

ALLEN v. CITY OF TORONTO.

Municipal Corporation—Contract—Specifications—Construction—Injunction.

Motion by plaintiffs for order continuing until the trial an interim injunction granted on 16th July restraining the defendants, their officers, servants, and agents, from proceeding to the completion and execution of certain contracts between defendants the City of Toronto and defendant Hole, trading under the name of the Forest City Paving Company, for the construction of an asphalt pavement upon Spadina avenue, from Queen street to College street, and on the west side of Spadina avenue from Baldwin street to College street, and upon Fern avenue, from Sorauren avenue to Roncesvalles avenue.

G. F. Shepley, K.C., for plaintiffs.

A. F. Lobb and W. C. Chisholm, for defendants the City of Toronto.

E. F. B. Johnston, K.C., for defendants the Forest City Paving Company.

LOUNT, J.—This whole matter turns upon the question as to the true construction and meaning of the contracts and of the specifications thereunder, and the board of control having, under the powers vested in them by the Municipal

Act, called for tenders, and certain persons having tendered, and the board having received and considered such tenders, the board is bound to accept asphalt of any of the three kinds mentioned in the third clause of the contract, or of any kind which, in the sole opinion of the city engineer, is as good as Trinidad asphalt, and there is no prohibition of the use of any other kind of asphalt than Trinidad, Bermuda, or German Rock, provided the tenderer states in his tender the kind proposed to be used. The time for the demonstration of the fact of whether the asphalt proposed to be supplied conforms to the specifications, is when such asphalt is about to be laid down, and, therefore, the contract in question is good and binding between the parties, and can only be put an end to by the contractor not providing, in the opinion of the city engineer, at such time for laying it, as good a quality of asphalt as the specified kind.

There is in the contract complained of a term departing from the specifications, and an undertaking will be given by defendants' counsel to strike out from the body of such contract the words "and that the asphalt to be used shall be in all respects equal to Alcatraz and other brands of California asphalt that have been used and are being used in the city of Brooklyn and other cities," and to strike out from the recital in the contract the following: "Whereas the engineer of the said city has reported to the board of control of the said city that the Alcatraz brand of California asphalt is equal in quality to Trinidad asphalt, and that asphalt equal in quality to the said Alcatraz brand of California asphalt will be satisfactory to him."

Motion dismissed and interim injunction annulled. No costs of application to either party.

FALCONBRIDGE, C.J.

JULY 18TH, 1902.

CHAMBERS.

IVEY v. MOFFAT.

Judgment Debtor—Examination—Insufficient Answers—"Worth" Examination.

Application by plaintiffs to commit defendant for refusal to disclose his property, or his transactions respecting the same, on his examination as a judgment debtor.

E. E. A. DuVernet, for plaintiff.

E. F. B. Johnston, K.C., for defendant.

FALCONBRIDGE, C.J.:—It is extremely unsatisfactory to attempt to dispose of an application of this nature on an examination taken down in narrative form and in ordinary handwriting—particularly so when the writing is not very legible, and erasures and interlineations appear in critical parts.

If I had to dispose of the matter as it stands, I should find it difficult to say that defendant had made satisfactory answers within the meaning of the statute. On his own figures, defendant has received a large amount of money which has not been properly accounted for. I shall give him a further opportunity to shew that these moneys have been properly dealt with by him. It will be to his advantage to take some trouble to give a proper account.

The defendant will attend at his own expense to be further examined.

Costs of the application reserved for the present.

When the matter comes up again, the solicitors will put in typewritten copies of the present material and of the further examination.

JULY 18TH, 1902.

DIVISIONAL COURT.

REX v. JAMES.

Fraud—Conviction—Fruit Marks Act, 1901—Fruit in Possession for Sale—False Representation of Contents of Packages—"Faced or Shewn Surface."

Motion to make absolute a rule *nisi* to quash defendant's conviction for an offence against sec. 7 of the Fruit Markets Act, 1901, made by the police magistrate for the city of Toronto on 17th February, 1902.

J. D. Montgomery, for the applicant.

R. B. Beaumont, for the respondent.

The judgment of the Court (MEREDITH, C.J., and MACMAHON, J.) was delivered by

MEREDITH, C.J.:—The conviction is in respect of 18 packages of apples, and is for selling and having in possession for sale the apples packed in these packages, in which the faced or shewn surface gave a false representation of the contents of the packages.

Ten of the packages were, according to the admission of the parties, in storage, and not intended for sale, and were

not in fact sold; and as to them the conviction cannot be supported. There must be, to constitute an offence against the section, either a selling or an offering or exposing or having in possession for sale; and there was neither.

The other eight packages were exposed for sale and actually sold; an offence against the section was complete, though no sale or offer to sell had taken place. The having of them in possession for sale is an offence against the section. This being so, it is immaterial that when sold the purchaser was not imposed upon, because, as the fact was, the whole contents were tipped out of the packages for his inspection, and he saw the quality of the bulk.

The Legislature, for the purpose of protecting the public against the frauds which the Act is designed to prevent, has chosen to make the law so stringent that the mere having in possession packages of fruit fraudulently packed—where the having in possession is for the purpose of sale—is an offence, and we have no warrant for refusing to give effect to the law it has enacted, because in the particular case no one was imposed upon and no fraud was intended by the person charged with the offence.

As at present advised, I do not see why the branded end of the package is the only place where “a faced or shewn surface” may be forced, or why, if the bottom of the barrel is faced with fruit of a better quality than the bulk, that is not enough to bring the case within the section. As pointed out by Mr. Beaumont, if it were otherwise, the provisions of the section might be easily evaded and purchasers imposed upon by the bottom of the barrel being opened and the fraudulently packed surface exhibited to the purchaser.

The conviction must be amended by confining it to the eight packages, and the offence to having them in possession for sale, and the fine will be reduced to \$20.

There will be no costs to either party.

It would be well, I think, if the Act were amended by defining the meaning of the term “the faced or shewn surface,” and possibly also by relieving from the penalty one who has in possession for sale packages fraudulently packed, if he is able to shew that he did not know of the fraudulent packing and was not ignorant of it negligently.

JULY 17TH, 1902.

DIVISIONAL COURT.

DELAHEY v. REID.

Sale of Goods—Unconditional Covenant to Pay Price—Counterclaim for Damages for Non-delivery of Part of Goods—Nominal Damages.

Appeal by defendant from the judgment of the County Court of Renfrew in favour of the plaintiff on a claim by the plaintiff, the manufacturer of the scales known as handy truck scales, to recover \$140, agreed to be paid by defendant to plaintiff for a full outfit for selling said scales in Orillia. The defendant counterclaimed for \$200 damages for loss of profit occasioned by the plaintiff making default in supplying within a reasonable time the truck scale which was part of the "outfit" agreed to be supplied. The County Judge gave judgment in favour of the plaintiff for the sum claimed, and dismissed the counterclaim.

R. D. Gunn, K.C., for defendant.

J. H. Moss, for plaintiff.

MEREDITH, C.J.:—In the circumstances of this case, we think that the omission of the respondent to supply within a reasonable time after the making of the contract the truck scale which was part of the "outfit" which, by the terms of the agreement, the respondent gave and assigned to the appellant—assuming it to have been the duty of the respondent to have forwarded it to the appellant—did not go to the root of the consideration, so as to relieve the appellant from liability to pay the purchase price of the rights which he bought from the respondent, and for which he unconditionally covenanted to pay on the 1st March, 1901, the \$140 which the respondent has recovered against him.

The other articles comprised in the "outfit" appear to have been furnished to the appellant in due time, and had he called attention to the omission to send the truck scale it would, no doubt, have been supplied at once; the reason why he did not appears from his letter of the 30th January, 1900, in which he unreasonably and unwarrantably assumed to repudiate his agreement, because, owing to a mistake in the address (the initial of the second Christian name having been written L. instead of T.), the respondent's letter accompanying the articles, which were sent before reaching the appellant, was handed out of the post office to another Alexander Reid, who, it was said, had, therefore, an opportunity of

learning the terms of the arrangement between the appellant and the respondent.

The cases collected in *Re Canadian Power Co.*, 30 O. R. 185, may be referred to as shewing that the appellant was not discharged by the omission to send the truck scale. The judgment in favour of the respondent was, therefore, right and should be affirmed.

As to the counterclaim, assuming that the respondent was in default in not sending on the truck scale, no damages have been proved to have been sustained by appellant owing to the omission to send it in due time, and we ought not to interfere with the disposition made of the counterclaim in the Court below, merely to give nominal damages.

Appeal dismissed with costs.

MACMAHON, J., concurred.

JULY 17TH, 1902.

DIVISIONAL COURT.

RE SUMMERS.

Executors and Administrators—Administration of Estate—Payment of Voluntary Debts—Bond—Natural Love and Affection—Evidence of Actual Valuable Consideration—Assignment of Securities at Face Value.

Appeal by Margaret Summers, widow of William R. Summers, against an order made by the Judge of the Surrogate Court of Elgin allowing an item of \$4,000 in the passing of the accounts of the executors under the will of William R. Summers.

T. W. Crothers, St. Thomas, for appellant.

A. B. Aylesworth, K.C., and John Crawford, Aylmer, for John R. Summers, W. B. Summers, and A. Chambers.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.:—The executors, in payment of a debt to John R. Summers of \$4,000, claimed as being due to him under an agreement or bond of his father, the testator, dated 10th March, 1899, assigned to him three several mortgages given to the testator, amounting in the aggregate to \$4,100. The difference between the \$4,000 and a month's interest thereon and the \$4,100, was accounted for by John R. Summers to the testator's estate.

The objection taken was that the agreement or bond was voluntary and without consideration, and payment thereof could not be enforced against the testator's estate by the obligee.

At the passing of the accounts by the executors, counsel for Margaret Summers objected to extrinsic evidence being given of another consideration than that mentioned in the agreement (which was "natural love and affection"), as it would contradict the deed. The evidence was received subject to the objection, and was to the effect that, twenty years prior to his death, the testator, who was a farmer, received an injury which incapacitated him from manual labour on the farm; that his two sons and their mother (who died in January, 1898) worked the farm they were then living on, and paid on a mortgage of \$1,600 that incumbered it; that by their combined industry they accumulated sufficient money to purchase another farm, which was conveyed to the father and stood in his name; that the two farms were worked by the sons, and the profits arising therefrom deposited by them to the father's credit in a bank at Aylmer until June, 1897, when the moneys standing to his credit were, by his direction, transferred to the credit of William R. Summers & Sons, which firm included the two sons mentioned; that the moneys in the bank were, as opportunity offered, invested in mortgage securities, only one of which was taken to the members of the firm, the others being taken to the father.

Prior to the agreement of the 10th March being entered into, the son William B. Summers was married, and was then residing in the house on the farm conveyed to him; his father and his brother John were living with him. At that time John was about to marry, and it was thought better that there should be separate households, and the family arrangement was entered into, by which each of the sons was to become the owner of a farm; the funds in the bank to the credit of the firm were to be retransferred to the credit of the father; the father was to retain all the mortgages, including the one taken in the names of the partners, which was to be assigned to him. This arrangement was carried out, and the assets thus transferred amounted to about \$14,000.

About a year later the father married a second time, and his widow is the present appellant.

In the agreement of 10th March there is a covenant by the father to pay his son John \$4,000, although the same is not payable until the death of the covenantor. Had this been merely a voluntary covenant, the only effect would be

to postpone its payment "to simple contract debts which are bona fide owing for valuable consideration; but such bond or covenant, if not to the prejudice of creditors, must be paid by the executors, and in preference to legacies:" Williams on Executors, 9th ed., pp. 869-870; *Cox v. Barnard*, 8 Hare 32; *Hales v. Cox*, 32 Beav. In England a change was made in the law as to payment of voluntary creditors by the Judicature Act of 1875, sec. 10, which introduces into the administration of the estates of deceased insolvents the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value. See *In re Whittaker*, [1900] 1 Ch. 9. The above section is not embodied in our Judicature Act.

Were it necessary to shew any other consideration than that which appears in the agreement, natural love and affection, evidence of such other consideration was properly received: *Clifford v. Turrell*, 1 Y. & C. Eq. 138, 9 Jur. 632; *Marsh v. Hunt*, 9 A. R. at p. 602.

The evidence shews that on the 10th March a family arrangement was agreed upon and consummated. There were the conveyances by the father to the sons, by which each became the owner of a farm; the giving by the father of a bond to his son John for the purpose of effecting an equalization as between the two sons. Then there was a transfer by the two sons to the father of their interest in the fund standing to the credit of the firm in the bank; the assignment on the same day by the sons of their interest in the Nisbet mortgage for \$1,000; and their agreement that the father should retain for his own benefit the other mortgage investments made from the funds in the bank. There was thus proved a general settlement and arrangement between these three, a division of the property in which all claimed an interest: *Persse v. Persse*, 7 Cl. & F. at p. 318; *Williams v. Williams*, L. R. 2 Ch. 294.

The only other point to be disposed of is that relating to the transfer by John R. Summers and his co-executor, Farthings, of the three mortgages belonging to the testator's estate in payment of the debt due to John R. Summers. There is nothing illegal or objectionable in this proceeding; the mortgage securities were taken at their par value. See Williams on Executors, 9th ed., p. 567; *Elliott v. Kemp*, 7 M. & W. at p. 313.

Appeal dismissed with costs.

MEREDITH, C.J.

JULY 16TH, 1902.

CHAMBERS.

FOLEY v. TRUSTS AND GUARANTEE CO.

Executors and Administrators—Bill of Costs for Services to Testator—Proceeding for Taxation—Application by Residuary Legatee—Rule 938—Assets—Indemnity.

Motion by plaintiff (residuary legatee), under Rule 938, for an order requiring defendants, the administrators with the will annexed of the estate of the late John Foley, deceased, to take proceedings to obtain an order for the delivery and taxation of the bill of costs, charges, and disbursements of a firm of solicitors who acted for the testator in the matter of an arbitration between him and the corporation of the city of Toronto. There were no assets in the hands of defendants, and they declined to proceed for a taxation unless under the direction of the Court and on being indemnified against costs.

S. W. McKeown, for plaintiff.

W. R. Smyth, for defendants.

MEREDITH, C.J.:—In dealing with the motion, it is to be treated as if an order had been made for the administration of the estate: *Re Warham, Hunt v. Warham*, [1892] 3 Ch. 59; *Re Sherlock*, 18 P. R. 6.

The practice where such an order has been made, and it is desired to take proceedings against one who is alleged to be a debtor to the estate, appears to be—where the personal representative desires the leave of the Court to bring the action or take the proceeding—for him to apply for the leave, and where he does not wish to apply, but a beneficiary is desirous that the proceeding shall be taken, for the latter to apply, and an inquiry is then had as to whether any, and what, proceedings should be taken against the alleged debtor, and if the result of that inquiry is that it is determined that the case is a proper one for proceedings to be taken, leave is given to take them. If the personal representative has been guilty of no misconduct and desires to conduct the proceedings, they are taken by him at the expense of the estate. If there has been misconduct on his part, or the personal representative does not desire to take the proceedings, leave is given to the beneficiary to take them in the name of the personal representative at the expense of the estate. Where there are no assets, it would seem that the personal representative is, in either case, entitled to be indemnified against the costs

to be incurred by the person desiring that the proceeding shall be taken.

The facts disclosed on this application, I think, warrant the giving of leave on the terms of the plaintiff indemnifying the defendants against the costs of and incidental to the proceedings and paying the costs of this application, and leave will be granted on these terms. The defendants will have the right to take the proceedings if they desire to do so, and they may be such as are indicated in the notice of motion, or such proceedings as may be advised for obtaining from the solicitors an account of the moneys received by them on behalf of the testator, and payment of any balance which may be found to be due by them as the result of the accounting. See *Barker v. Birch*, 1 DeG. & S. at p. 381; *Harrison v. Richards*, L. R. 1 Ch. 473; *Yeatman v. Yeatman*, 7 Ch. D. 210.

MEREDITH, C.J.

JULY 17TH, 1902.

WEEKLY COURT.

EARLE v. BURLAND.

Interest—Charging Accounting Party with—Further Directions—Costs.

Motion by plaintiffs for judgment on further directions and as to subsequent costs reserved by judgment at trial, as varied by the Court of Appeal and Judicial Committee.

F. H. Chrysler, K.C., for plaintiffs.

W. D. Hogg, K.C., for defendants.

MEREDITH, C.J.:—The only question in controversy is whether defendant G. B. Burland shall be charged with interest on sums which the local Master at Ottawa has, by his report of 11th April last, found him to be liable to account for and to pay over to defendant company under the reference directed by the judgment.

It is in accordance with the practice of the Court in a proper case to award interest against an accounting party on further consideration, although the question has not been reserved by the original judgment; and this is a proper case in which to direct the payment of interest by defendant Burland. Daniell's Chy. Prac., 7th ed., p. 950, and cases there cited, referred to.

Judgment directing defendant G. B. Burland to pay to defendant company the amount with which the local

Master has found him to be chargeable, together with interest upon it, and also the subsequent costs reserved by the judgment.

JULY 18TH, 1902.

DIVISIONAL COURT.

RAT PORTAGE LUMBER CO. v. KENDALL.

Contract—Division of Profits—Partnership—Question of Fact—Burden of Proof—Appeal.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., at the trial, in action to recover \$2,486.30, being the amount claimed for lumber, etc., alleged to have been supplied by plaintiffs to defendant, and \$1,500 alleged to have been advanced by plaintiffs to defendant. The defendant counterclaimed for \$4,530.87, alleged to be due by plaintiffs under a contract for division of profits and for materials supplied. The trial Judge found that there was no dispute as to plaintiffs' claim, and, the evidence as to the counterclaim being conflicting, that the defendant had not satisfied the burden of proof; and he, therefore, gave judgment for the plaintiffs on their claim, and dismissed the counterclaim.

The appeal was heard by MEREDITH, C.J., MACMAHON and LOUNT, JJ.

R. C. Clute, K.C., for defendant.

N. W. Rowell, K.C., for plaintiffs.

THE COURT held that, on the evidence, it would be impossible to set aside the findings of the trial Judge; and, assuming that Kendall and Harty were partners, and that most of the work and expenditure in connection with the contract was by the partnership, with the knowledge of the plaintiffs, that would be of no avail to defendant in this action, which is against Kendall alone.

Appeal dismissed with costs; but judgment of trial Judge varied by adding a provision that it is to be without prejudice to defendant's rights in respect of the moneys received by plaintiffs on account of the contract with one Caldwell, and the same as to the sum allowed and deducted by the trial Judge from plaintiffs' claim.

FALCONBRIDGE, C.J.

JULY 19TH, 1902.

TRIAL.

GREAR v. MAYHEW.

*Vendor and Purchaser—Action for Purchase Money—Evidence—
Trespass to Goods.*

Action to recover \$400, the purchase price of certain land which, as the plaintiff alleged, she agreed to sell to defendant, and of which the defendant obtained a conveyance without payment of the purchase money, and for damages for trespass to person and assault, and trespass to goods.

Solomon White, Windsor, and D. S. McMillan, Sarnia, for plaintiff.

F. W. Kittermaster, Sarnia, for defendant.

FALCONBRIDGE, C.J.:—As to the real estate transaction, the evidence of N. Gurd for defendant is quite clear and satisfactory; and as to the goods, plaintiff's evidence is not sufficiently satisfactory or lucid to found a judgment for any sum whatever. As defendant might have condescended to clear up that matter, if she could, by evidence on her part, the present action shall be dismissed without costs, and without prejudice to any action which plaintiff may be advised to bring in a Division Court in respect of the goods only.

ROBERTSON, J.

JULY 21ST, 1902.

TRIAL.

BREAKENRIDGE v. MASON.

*Building Contract—Action for Balance Due—Counterclaim—
Evidence.*

Action to recover \$262.80, balance claimed by plaintiff for work on a barn. The defence was that the work was negligently and unskillfully performed, and the defendant also asserted a set-off, and counterclaimed for damages for material spoiled.

G. W. Wells, K.C., for plaintiff.

S. G. McKay, Woodstock, for defendant.

ROBERTSON, J., dealing with the case as a jury would, and reviewing the conflicting evidence, found all the issues for the plaintiff, in whose favour he gave judgment for \$260.55, with interest from 1st November, 1901, and full costs on the High Court scale; and dismissed the defendant's counterclaim with costs.

JULY 15TH, 1902.

DIVISIONAL COURT.

MINERVA MANUFACTURING CO. v. ROCHE.

Costs—Scale of—Jurisdiction of County Court—"Amount Ascertained by the Act of the Parties or the Signature of the Defendant."

Appeal by the defendant from an order of FALCONBRIDGE, C.J., affirming a ruling of the senior taxing officer at Toronto that the costs should be taxed on the High Court scale.

The action was brought to recover \$282.10 as the price of goods sold and delivered by the plaintiffs to defendant, the invoice for which comprised a great many items. The goods were shipped from Toronto by the Canadian Pacific Railway to the defendant's address at Ottawa, and on the day after their arrival at the Ottawa station were destroyed by fire. The defendant brought an action against the railway company for the loss of the goods, which was dismissed.

While the action against the railway company was pending plaintiffs threatened to sue defendant for the price of the goods, but after a discussion between the solicitors, the defendant's solicitor on the 21st November, 1901, signed the following undertaking on behalf of his client, addressed to the plaintiffs :

"We hereby admit liability of our clients to you for goods destroyed in the Ottawa fire, and agree to pay for them immediately after trial of our suit against the C. P. R., which we agree to get disposed of as expeditiously as possible; the consideration for the above being your agreement to wait till the said case is tried or otherwise earlier disposed of. And it is understood that the above admission of liability and agreement to pay is not conditional on our succeeding in said suit."

On 4th December, 1901, the plaintiffs commenced this action in the High Court for the price of the goods, and after the defendant had filed a statement of defence, she was examined for discovery, and the plaintiffs, on summary application, were allowed to enter judgment for the amount claimed with costs. Upon the taxation of such costs, the question arose.

G. F. Shepley, K.C., for defendant.

A. C. McMaster, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.—By the County Courts Act, R. S. O. ch. 55, sec. 23, sub-sec. 2, that Court has jurisdiction “in all causes and actions relating to debt, covenant, and contract to \$600, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant.”

The defendant admitted that certain goods purchased by her from the plaintiffs were destroyed by fire at Ottawa, but there is no admission as to the value of the goods, and where the claim exceeds \$200 it is only in cases where the “amount” is ascertained by the act of the parties or the signature of the defendant that the action is within the jurisdiction of the County Court. And had the plaintiffs proceeded to trial, in order to recover they must have given evidence as to the value of the goods which they had shipped to the defendant.

An affidavit made by the plaintiffs’ solicitor was filed on the motion before the Chief Justice of the King’s Bench, in which he states that the defendant’s solicitor, when the undertaking of the 21st November was given, refused to admit the amount or value of the goods shipped.

We cannot interfere with the order made by the Chief Justice. The appeal will, therefore, be dismissed with costs, fixed at \$20.

ROBERTSON, J.

JULY 21ST, 1902.

PILGRIM v. CUMMER.

Partnership—Offer of Partner to Sell Share to Co-partners—Acceptance—Specific Performance—Terms—Improvidence—Security—Costs.

Action for an account of the transactions between plaintiff and defendants, who, in May, 1899, entered into partnership as manufacturers of aerated waters at Hamilton under the firm names of “Pilgrim Bros. & Co.” and “The Hamilton Mineral Water Co., Pilgrim Bros. & Co., Proprietors,” and continued until 15th February, 1902, when, the plaintiff alleged, the defendants excluded him from the partnership premises and affairs, since when the defendants have been carrying on business with the partnership assets.

The defendants alleged that prior to 15th February, 1902, they purchased the plaintiff's interest in the partnership; that on the 21st December, 1901, the plaintiff offered in writing to sell his interest to the defendants for \$2,000 cash, upon his being freed from all liabilities of the firm, and to covenant not to carry on the same kind of business within 200 miles of Hamilton, and to procure his wife to join in such covenant and to secure it upon her property in Hamilton; that the defendants accepted the offer, and had always been ready and willing to carry it out, but the plaintiff had refused to do so on his part; and the defendants asked for specific performance of the agreement.

The plaintiff replied that the offer or agreement was an improvident one, and that he was not able to carry it out because of his wife's refusal to give the security mentioned.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for plaintiff.

J. P. Mabee, K.C., and G. C. Thompson, Hamilton, for defendants.

ROBERTSON, J.—I am forced to the conclusion that what is alleged by plaintiff in reply to the defence set up by defendants is substantially true, and I, therefore, find all the issues of fact in favour of plaintiff. . . . I find specifically that plaintiff always was, and now is, ready to carry out the agreement on his part, and that it is a fact that he has been unable to procure his wife to execute the security mentioned in the letter containing the offer. And I think defendants are entitled to have judgment for specific performance of so much of the agreement as is not involved in plaintiff procuring the execution by his wife of the covenant in said letter mentioned. I am of opinion that plaintiff, when he signed the letter, did not intend to bind himself to procure his wife to join in the covenant so as to charge her lands with a consequence of the breach thereof on the part of plaintiff, and I so find. He promised, no doubt, to ask her to do so; but to be bound that she would do so, or that he would accept an abatement from the purchase money of \$2,000 in case she refused, he had not in contemplation; and, in my judgment, it would not be just or equitable to order any abatement, or to compel plaintiff to furnish other security. . . .

The authorities are overwhelming that plaintiff cannot be compelled to procure his wife to charge her lands, even if he

had intended to agree that she should do so. Courts of Equity long ago endeavoured to enforce specific performance of such agreements; but all they could do then was to imprison the husband until the wife complied, but that was at last determined to be unreasonable. . . . Now the rule is not to decree specific performance of such an agreement, leaving the party aggrieved to seek compensation for any loss. As to loss, however, or damages therefor, how can they be assessed here? If the plaintiff performs his covenant not to carry on the same business, there is no damage; and, as the Courts afford ample protection by injunction, the defendants are amply protected. . . .

In regard to the costs, it is clear from the evidence and correspondence that plaintiff was ready and willing and by his solicitors offered before the action was commenced to do and perform all that plaintiff was legally or equitably bound to do; but, by a system which has not commended itself to my mind, the defendants have endeavoured to force plaintiff into doing what was unconscionable, thus driving him into this litigation. The defendants should pay to plaintiff the costs of this action.

[The following authorities, among others, were considered: *Van Norman v. Beaupre*, 5 Gr. 599; *Loughead v. Stubbs*, 27 Gr. 387; *Fry on Specific Performance*, sec. 1222. and cases cited; *Hughes v. Jones*, 3 DeG. & F. 1, 315.]

FALCONBRIDGE, C.J.

JULY 30TH, 1902.

TRIAL.

STYLES v. TOWERS.

Way—Private Way—Easement—Implied Grant—Intention.

Action for damages for deprivation of use of an alleged right of way; and for a declaration as to plaintiff's right, and for an injunction.

The plaintiff claimed a right of way by implied grant, or by general words, such as those used in R. S. O. 1897 ch. 119, sec. 12, treating the right as a quasi-easement, not of absolute necessity, yet in some sense essential to the enjoyment of the property conveyed to him.

J. A. Robinson, St. Thomas, for plaintiff.

C. F. Maxwell senior and C. F. Maxwell junior, St. Thomas, for defendants.

FALCONBRIDGE, C.J.—The numerous cases cited by plaintiff do not establish his contention; and this is not a case where there was a right of way existing from one close to another, which has become merged by the fact of the same person having become the owner of both properties, but is at most the user of a way which has been made by the owner of adjoining closes, and first used during unity of possession. It is not in continuous use like a waterway; and, therefore, would not pass by general words, unless the necessary intention were shewn that it should pass; and such has not been shewn in this case. I refer to *Thompson v. Waterlow*, L. R. 6 Eq. 36; *Bolton v. Bolton*, 11 Ch. D. 968; *Goddard on Easements*, 3rd ed., p. 139; and *Elphinstone on Interpretation of Deeds*, Bl. ed., p. 192. Taking this view, I deem it unnecessary to consider the effect of the mortgages, or of the part discharge thereof.

Action dismissed without costs.

JULY 31ST, 1902.

DIVISIONAL COURT.

RE WILLIAMS.

*Trustees—Remuneration of—Quantum of Allowance—Capital—Income
Solicitor-trustee—Profit Costs.*

Appeal by G. M. Macdonnell, one of two trustees of the estate of E. Williams, deceased, from an order of the Judge of the Surrogate Court of Frontenac fixing the appellant's remuneration for his care, pains, and trouble in and about the estate for the period since August, 1891. The Surrogate Judge allowed the trustees five per cent. upon the interest collected, and made no allowance of any kind for any other services, giving as a reason that he had in a former order fixing the remuneration up to August, 1891, and allowed the trustees two and a half per cent. for taking over the principal.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

G. F. Shepley, K.C., for appellant.

J. A. Hutcheson, Brockville, for the other trustee and the beneficiaries.

The judgment of the Court was delivered by

STREET, J.—The Court is warranted under *Re Berkeley's Trusts*, 8 P. R. 193, and the authorities there referred to, in holding that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make to them an annual allowance for their services in looking after the corpus of the fund, receiving repayments upon principal, and re-investing it; and this allowance should not depend upon the amount so collected and re-invested, but should be a fixed annual allowance based upon the nature of the property and the consequent degree of care and responsibility involved. Under the authorities referred to the Surrogate Judge adopted an erroneous basis for the remuneration of the trustees during the period ending in 1891, in allowing them a percentage upon the principal sum taken over, and nothing for the collection of interest upon the trust fund during the period, excepting for the interest accrued at the testator's death; he should have allowed the trustees nothing for taking over the estate, but should have allowed them a percentage upon all the interest collected and paid over, and an annual sum for the care of the estate. The amount allowed the trustees in 1891 should, perhaps, upon any final computation of their remuneration, be treated as a satisfaction for their services in the collection of interest and the care of the principal down to 1891, rather than for the taking over of the principal; which seems to be a matter to be dealt with at the conclusion of the trust. The sum allowed for taking over the principal by the former order had all been well earned during the period covered by that order, in caring for the principal and collecting the interest during that period, and the trustees were entitled to a new allowance based upon their services between 1891 and 1902; and \$100 per year would be a reasonable and proper allowance to make for the receipt of repayments on principal invested, their re-investment, and the constant watchfulness and care required in order to guard from loss a fund invested upon ordinary securities. In addition to this, the allowance of 5 per centum made by the Surrogate Judge for the collection of the interest and its payment over

to the persons entitled under the will, is by no means excessive, when the nature of the securities (small mortgages) is considered; the result being a yearly charge to the trust of about \$280 in all, for management, a sum representing less than one-half of one per cent. per annum upon the principal of the fund. The appellant should have been allowed \$2,314, instead of the \$1,500 allowed him by the Surrogate Judge.

Regarding the question raised before the Surrogate Judge as to the appellant's having charged certain profit costs to the estate to which he was not entitled, the general rule is that a trustee-solicitor is not entitled to charge the estate with any professional services; but an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Craddock v. Piper*, 1 D. M. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustees, is entitled to recover profit costs, and, therefore, to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This exception is not to be extended to proceedings or professional services rendered to the estate out of Court: *Re Corsellis*, 34 Ch. D. 675; *Re Mimico Sewer Pipe Co.*, 26 O. R. 288; *Lewin on Trusts*, 10th ed.; *Broughton v. Broughton*, 5 D. M. & G. 160; and *Re Doody*, [1893] 1 Ch. 129, 138, 139, 141.

There are charges in the appellant's accounts for professional services which do not come within the exception sanctioned by *Craddock v. Piper*; and these should be deducted. If there should be any dispute as to such items, the matter may be spoken to again, and a reference ordered, if necessary. Costs of appeal to be paid out of Court to all parties, to be taxed as between party and party.

JULY 31ST, 1902.

DIVISIONAL COURT.

MIDDLETON v. SCOTT.

Mortgage—Mortgagee's Costs—Unnecessary Proceedings—Tender—Waiver.

Appeal by plaintiff from order of STREET, J., 3 O. L. R. 27, allowing defendant's appeal from report of local Master

at Chatham, to whom this action (for redemption) was referred; and cross-appeal by defendant (mortgagee) from so much of such order as precluded defendant from having the costs of the action and deprived defendant of interest post diem at the rate of 8 per cent. per annum, as stipulated for in the mortgage deed.

M. Wilson, K.C., and J. B. O'Flynn, Chatham, for plaintiff.

W. E. Middleton, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.:—Counsel for plaintiff contends that the conduct of defendant's solicitor in claiming from plaintiff \$8.13 in connection with some alleged proceedings under the power of sale in the mortgage, in addition to principal and interest, amounted to a dispensing with a tender of principal and interest to the agent and solicitor of defendant. [Reference to *Ex p. Darch*, 22 L. J. N. S. Bkcy. 75; *Jones v. Tarleton*, 9 M. & W. 675; *Kerford v. Mondel*, 20 L. J. Ex. 303; *Llade v. Morgan*, 23 C. P. 517; *Robbins on Mortgages*, pp. 710, 711; *Fisher on Mortgages*, p. 1503.]

There is nothing in the evidence or correspondence that would warrant the view that a tender of the principal and interest was dispensed with, and the solicitor's claim for \$8.13, the costs of the alleged proceedings under the power of sale, could by no possibility dispense with a tender of the amount due on the mortgage; and, there being no tender and no dispensation with a tender, the interest continues to run.

Although by paragraph 3 of the judgment of reference the Master is directed to report specially his findings on all matters relating to the alleged tenders or excuses for tender, and to any matters affecting the question of costs, since the question of costs is not reserved to be afterwards dealt with, this direction is an inconsequential and useless one; and, in any case, insufficient to control the direction contained in paragraph 4 to tax costs, and the provision of Rule 756, that they shall be taxed to defendant; and therefore Mr. Justice Street's view that the costs of the action, except in the event mentioned in paragraph 7, are not dealt with, is erroneous; and under the terms of the judgment, in the event that has happened, the defendant is entitled to the costs

of the action. The provision in the mortgage that interest is to be paid at the rate of 8 per cent. per annum after maturity means after the principal money has become payable, that is to say, after the expiration of the five years as well as before, and in that view of its meaning there is no room for the application of the principle applied in such cases as *People's Loan Co. v. Grant*, 18 S. C. R. 262, such a construction of the proviso for redemption being here excluded by the provision that interest at 8 per cent. is to be paid after the maturity of the principal sum—in other words, after the principal sum has, according to the terms of the proviso, become payable.

Plaintiff's appeal dismissed with costs, and defendant's cross-appeal allowed with costs; and order of STREET, J., varied by directing interest on the whole \$324 to be calculated at rate of 8 per cent. per annum, and the defendant's costs of the action to be added to the principal and interest.

ROBERTSON, J.

JULY 28TH, 1902.

WEEKLY COURT.

FALLS v. BANK OF MONTREAL.

Lunatic—Residence abroad—Domicil in Ontario—Money in Bank in Ontario—Right of Foreign Committee to—Change of Domicil—Private International Law—Costs.

Motion on behalf of plaintiff, Frederick W. Falls, a lunatic so found by judicial declaration of a Court in the State of Pennsylvania, by Charles William Allen, his committee, for judgment on the pleadings in an action for payment by defendants to the committee; for plaintiff, of \$2,005.50 and interest from 31st December, 1901, and for a declaration that such payment is a valid discharge of defendants. The moneys in question were deposited by the plaintiff, before he was declared insane, with the defendants in the savings bank department at the Yonge street branch in the city of Toronto. The defendants admitted that they had the money on deposit, and claimed the protection of a judgment before paying it over, and asked for costs. The plaintiff is a British subject, born in the Province of Ontario, 30 years ago, and resided therein until about four years ago, when, after travelling in

Europe, he went to Philadelphia, where his mother and sister lived, and where he has since resided. He is an artist, and had a studio in Philadelphia, where he painted numerous pictures of considerable value. The principal part of the moneys in question were remitted by plaintiff to the defendants from Philadelphia in a letter dated the 31st December, 1901. He became a lunatic on the 9th January, 1902, and Allen was appointed committee of his estate (consisting of about \$12,000) on the 3rd March, 1902.

S. B. Woods, for plaintiff.

J. A. Worrell, K.C., for defendants.

ROBERTSON, J.—A British subject, before he can be held to have become a subject or citizen of a foreign country, must not only express clearly an intention to do so, but must perform some act from which the inference to be drawn is conclusive. In *re Patience*, 29 Ch. D. 976, *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307, *Udny v. Udny*, L. R. 1 H. L. 441, *Moorhouse v. Lord*, 10 H. L. C. at p. 291, *Doucet v. Geoghegan*, 9 Ch. D. 441, *Urquhart v. Butterfield*, 37 Ch. D. 357, *King v. Foxwell*, 3 Ch. D. at p. 520, and *Didisheim v. London and Western Bank*, [1900] 2 Ch. 15, considered.

The plaintiff's original domicil was in Ontario, and there is no evidence that by any act of his he has changed it. There is nothing to shew any intention to become an American citizen. The lunatic is, therefore, a British subject, and the fund being in this country, the complexion of the case is altered in regard to the disposal of it. As the lunatic has been judicially declared such by the Court in Philadelphia having jurisdiction in that behalf, and as that Court has authorized its officer, the committee, to take these proceedings, on general principles of private international law the Courts of this country are bound to recognize the authority conferred on him by that Court; and if a proper case is made out to warrant the Court, in its discretion, in ordering the amount to be paid over, it should be so ordered. If the amount now sought to be recovered were necessary for the maintenance of the lunatic, it should be paid over to the committee. The committee is not entitled to get in all the estate, wherever found, for the purpose of preserving it. In *re Brown*, [1895] 2 Ch. 666, referred to. The committee has in his hands money and property of the value of more than \$12,000. So that this money is not

necessary for the support of the plaintiff. Therefore the defendants should not be ordered to pay over the whole sum, but the defendant should be discharged upon payment of the amount into Court to the credit of plaintiff, and the interest now accumulated should be paid over to the committee, who may apply for further payments of interest or principal as occasion may arise. The defendants are entitled to costs, as between solicitor and client, out of the fund. *Vane v. Vane*, L. R. 2 Ch. 124, *Jones v. Lloyd*, 22 W. R. 787, *In re Bligh*, 12 Ch. D. 364, *In re Tower*, 32 Ch. D. 39, and *New York Security Co. v. Keyser*, [1901] 1 Ch. 666, referred to. Judgment accordingly.

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BRITTON, J.

AUGUST 1ST, 1902.

TRIAL.

PIGGOTT v. TORONTO RUBBER SHOE MANUFACTURING CO.

*Building Contract—Materials Supplied not Covered by Contract
—Damages—Arbitrator—Bias of—Lien.*

Action tried at Hamilton and Toronto, brought by the plaintiff, a contractor, against the defendant company to recover the cost of work done and materials supplied, which were not covered, or only partly covered, by the contract for the construction of certain works for a hydraulic power system at Port Dalhousie. The plaintiff also sought to have the defendant Hillman declared disqualified to act as arbitrator on the ground of bias against the plaintiff, and to enforce his registered lien against certain other defendants who claimed some interest in the property in question.

Wallace Nesbitt, K.C., G. Lynch-Staunton, K.C., and E. F. Lazier, Hamilton, for plaintiff.

R. C. Clute, K.C., and J. A. MacIntosh, for defendant company.

J. V. Teetzel, K.C., and G. C. Thompson, Hamilton, for defendant Hillman.

BRITTON, J., held, that the defendant Hillman before and at the time of making his final estimates had a bias against the plaintiff and had not acted impartially towards him. The plaintiff, therefore, was entitled to have his claim further investigated, and he was allowed a reference with respect to his claim, in so far as not otherwise disposed of, to ascertain what amount was due him from the defendant company. The plaintiff was further entitled to a mechanic's lien upon the property in question, but only for the amount found

due by the Master, said lien to rank in priority to the estate or interest of the defendants or mortgagees, in so far as the work done and materials provided by the plaintiff have increased the selling value of said lands. Judgment for the plaintiff with costs, but costs of the reference reserved. If necessary to enforce his lien by sale, the plaintiff may apply for further order and directions.

Lazier & Lazier, Hamilton, solicitors for the plaintiff.

Clute, Macdonald, & MacIntosh, solicitors for the defendant company.

Teetzel, Harrison, & Lewis, solicitors for defendant Hillman.

MACMAHON, J.

AUGUST 1ST, 1902.

TRIAL.

OMAN v. COPP-CLARK CO.

Copyright — Infringement of — Imperial Act 5 & 6 Vict. ch. 45 — Injunction—Damages.

Action brought by the plaintiff, a professor of ancient history at Oxford University and author of a work "A History of Greece from the Earliest Times to the Macedonian Conquest," published in 1890, against the defendants, the Copp-Clark Co., W. J. Robertson, and John Henderson, for alleged infringement of the plaintiff's copyright in part of the book entitled "High School History of Greece and Rome," published in 1896. The plaintiff's work was registered pursuant to Imperial Copyright Act 5 & 6 Vict. ch. 45. Defendants the Copp-Clark Co. consented to a perpetual injunction against their further dealing with the book and agreed to deliver up all unsold copies. Defendants Robertson and Henderson contended that their history, except maps and plans, is the bonâ fide result of their labour and research among standard authorities, and that the maps and plans were utilized by the Copp-Clark Co. on the company's own authority without their consent.

G. F. Shepley, K.C., and J. F. Smith, K.C., for plaintiff.

D. E. Thomson, K.C., for defendants Copp-Clark Co.

C. A. Moss, for defendants Henderson and Robertson. cited *Speirs v. Brown*, 6 W. R. 352; *Scrutton's Law of Copyright*, 3rd ed., 138; *Bromwell v. Halcomber*, 3 My. & Cr. 738; *Folsam v. Marsh*, 2 Story 115; and *Copinger's Law of Copyright*, 3rd ed., 63.

MACMAHON, J.—Held, that the plaintiff had used the historical facts common to all, but had shewn originality in

the treatment of the subject, proved by its reproduction to the extent of nine editions. A comparison of the two histories leaves the irresistible conclusion that the defendants adopted the plan of the plaintiff's work; that they used or allowed the Copp-Clark Co. to use the plaintiff's maps; and that they compiled material parts of their work from the plaintiff's history with colourable alterations and variations, always regarded as cogent evidence of *animus furandi*. Judgment for the plaintiff granting an injunction restraining the defendants Robertson and Henderson from further infringing plaintiff's history and directing them to deliver up to plaintiff's solicitor under oath all copies of the said book in their own or their agents' possession. Reference as to profits made by defendants Robertson and Henderson out of their book unless plaintiff consents to damages being assessed at a nominal sum. Defendants Robertson and Henderson to pay costs, less costs of making the Copp-Clark Co. defendants to the action.

Smith, Rae, & Greer, solicitors for the plaintiff.

Thomson, Henderson, & Bell, solicitors for defendants the Copp-Clark Co.

Barwick, Aylesworth, Wright, & Moss, solicitors for defendants Robertson and Henderson.

AUGUST 1ST, 1902.

DIVISIONAL COURT.

RE BRAMPTON GAS CO.

Company — Winding-up — R. S. C. ch. 129 — Master in Ordinary — Jurisdiction of, in Winding-up — Valuing Securities — Liquidator.

Appeal by Bank of Montreal and C. Blayney from ruling of Master in Ordinary that he had jurisdiction to determine the claims made by appellants and also the matters raised by the liquidator in his notice of contestation served on appellants pursuant to direction of the Master in Ordinary, and that he ought to exercise that jurisdiction. The Brampton Gas Co. is being wound up under the Dominion Winding-up Act, and the Bank of Montreal claim to be the holders of ten mortgage debentures of the company for \$500 each, secured by a mortgage on the assets of the company, and to hold them as security for two promissory notes made by the company and indorsed by L. E. Dancey. Appellant Blayney claims to be holder of other ten mortgage debentures similarly secured, and also to be an unsecured creditor for \$208.61. The liquidator disputes the validity of the mortgage debentures and the mortgage purporting to secure the

same, and alleges that if valid the debentures were used by one of the officers of the company in fraud of the company.

G. F. Shepley, K.C., for appellant Bank of Montreal.

W. A. Skeans, for appellant Blayney.

Hamilton Cassels, K.C., for liquidator.

Judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MEREDITH, C.J.:—I am unable to agree with the ruling which has been made. It is plain, I think, that the debts, for the proof of which provision is made by sec. 56 and the following sections, which deal with the subject of proof of debts, are unsecured or only partly secured debts, in respect of which the creditor seeks to rank upon the general estate of the company in the liquidation, and have no application to fully secured claims where the creditor is content to rely upon his security and that only, and does not seek to share in common with other creditors in the distribution of the general assets of the company.

The provisions as to valuing securities (secs. 62, 63) are in entire harmony with this view.

Nor are these provisions applicable where there is a contest as to the right of the creditor to the security which he claims to hold for his debt. They are in their very nature applicable only where the right to the security is not disputed, and, as I have already said, are designed for the purpose of ascertaining for what sum the creditor is to be entitled to prove in the liquidation as an unsecured creditor.

Nowhere in the Act do I find any power conferred upon the Court in the winding-up to call upon any one who does not claim to rank as a creditor and to be entered upon the dividend sheet, to submit his right or title to any security he claims to have upon the property of the company to adjudication by the Court, or anything which confers upon the Court jurisdiction to try the question of right in the winding-up.

The course taken by the appellants in sending in their claims has led, I think, to the complications which have arisen; and though the ruling appealed from should be reversed, it is not, I think, unreasonable that the appellants should bear their own costs of the appeal. The costs of the liquidator will be paid out of the estate.

Proudfoot & Hayes, Goderich, solicitors for the appellants the Bank of Montreal.

E. G. Graham, Brampton, solicitor for appellant Blayney.
Cassels, Cassels, & Brock, solicitors for the liquidator.

MACMAHON, J.

AUGUST 2ND, 1902.

WEEKLY COURT.

RE MEDLER AND CITY OF TORONTO.

*Arbitration and Award—Appeal from—Costs—Closing of Street—
Railways—55 Vict. ch. 90, sec. 2 — 56 Vict. ch. 48.*

Appeal by Medler and Arnot from an award of arbitrators and cross-appeal by the city of Toronto as to allowance of \$100 damages. Appellants allege that their lands on Berkeley street, Toronto, have been injured by the laying of tracks for shunting purposes, and by the closing of Berkeley street pursuant to tripartite agreement between the city, the Grand Trunk and Canadian Pacific Railway Companies, and ratified by 55 Vict. ch. 90, sec. 2.

J. M. Reeve, K.C., for plaintiff.

J. S. Fullerton, K.C., for defendants.

MACMAHON, J., held that the city cannot be held liable in damages, because prior to the tripartite agreement the Railway Committee of the Privy Council had granted, February 23rd, 1892, leave to the railway companies to construct their lines along Mill, Parliament, and Berkeley streets, and permitted a deviation of Berkeley street, and this leave had been ratified by 56 Vict. ch. 48; nor does sec. 2 of the former Act make the city liable because the injury complained of is not within the meaning, as a liability could only arise where some person's lands are injuriously affected, and here they are not, the injury not being to the land but consisting in personal inconvenience to the owners: *Caledonian v. Ogilvie*, 2 Macq. 229; *Beckett's case*, L. R. 3 C. P. at p. 94; *Powell v. Toronto H. & B. R. W. Co.*, 25 A. R. 209. Appellants are not entitled to damages by reason of loss from filling in the lots south of the new windmill line, because they have no title to the water lots in question; they are not entitled to damages for the closing of Berkeley street because their lands do not abut thereon: *Falls v. Tilsonburg*, 23 C. P. 167. Held, also, that the arbitrator had no discretion to direct the costs, including stenographer's fees, to be paid by the city. Appeal dismissed with costs and cross-appeal allowed.

AUGUST 6TH, 1902.

DIVISIONAL COURT.

CROSBY v. BALL.

*Life Insurance — Disposition of Moneys between Two Wives both
Living—"Dependent"—Judgment ex Aequo et Bono.*

Appeal by plaintiff from judgment of BOYD, C., in defendant's favour as to who, as between plaintiff and defendant,

was entitled to \$939. 07 insurance moneys, payable under an endowment certificate issued by the Supreme Tent of the Knights of the Maccabees of the World. The plaintiff married Philip Crosby, deceased, in 1860. In 1886 he married the defendant. The trial Judge found that defendant did not know of a former marriage, and held that the ownership of the fund, which was to be paid to the insured's "wife." Mary Crosby, should be decided *ex aequo et bono*, and since it was perfectly manifest from the evidence that the deceased never intended the money to go to the plaintiff, he gave judgment in defendant's favour.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. M. Douglas, K.C., for plaintiff.

A. Weir, Sarnia, for defendant.

FALCONBRIDGE, C.J.:—There is no question, on the evidence, but that the insurance was effected for the defendant, Mary Ball. She is the person designated as beneficiary, although she may, strictly speaking, be misdescribed as wife; and the only point for decision by us is whether she can be a legal beneficiary under the rules of the association. By sec. 174 of the Revised Laws of the K. O. T. Maccabees, edition of 1899, it is provided: "No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister, brother, aunt, uncle, nephew, niece, cousin, step-child, step-parent, half-sister, or half-brother of the member . . ." The defendant claims as dependent, and it was argued to us, on the part of plaintiff, that the dependent in the section should be a person related by blood or affinity to the member. I am of the opinion that there is no room for the application of any doctrine of *ejusdem generis* or *noscitur a sociis*. . . . It is perfectly manifest that it was intended that a dependent, that is, one who is sustained by the member or who relies on the member for support or maintenance, ranks next after wife, husband, and children, apart from any question of legal relationship.

She is entitled to the fund in Court. The position of a "dependent" has been considered in the following cases: *Main Colliery Co. v. Davies*, [1900] A. C. 358; *McCarthy v. New England Order of Protection* (1891), 153 Mass. p. 314; and the unreported, but well considered, portion of the judgment of Meredith, J., in *Styles v. Supreme Council Royal Arcanum* (1897), 29 O. R., referred to in the note on page 40.

STREET, J.—Under the rule 174 of the Order under which the policy was granted a policy may be made payable to a wife or a dependent; it might have been made payable in the first place to the defendant as a dependent had the facts been known. The person being ascertained, and she being a person who might take under the rule referred to, I can see no sound reason why she could not take in the character of dependent although she cannot do so in the character of wife.

The appeal should, therefore, in my judgment, be dismissed with costs, and the money in Court should be ordered to be paid out to the defendant.

BRITTON, J., concurred.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

RYAN v. CATHOLIC ORDER OF FORESTERS.

Life Insurance—Mutual Benefit Society—Contract Uberrimae Fidei—Untrue Representations in Application—Agency.

Action by the mother of James Ryan, deceased, to recover \$1,000. A certificate was never issued. The application of deceased for membership in St. Leo Court, Toronto, was dated October 20, 1899, and by it he agreed that any untrue or fraudulent representations made in it or any concealment of facts "shall forfeit the rights of myself and my family to all benefits and privileges," etc. The approval of the High Medical Examiner to the application was given November 4, 1899, and, as required by the rules, the applicant was notified to attend a regular meeting for initiation within thirty days. He did not attend within that time, but was initiated at a meeting on December 6, 1899, by the officers of the court who did not know that the thirty days had expired. The recording secretary forwarded applicant's roster to the high secretary at the head office in Chicago, U.S., and he replied December 21, 1899, that as the time that had elapsed between the time limit and initiation was so short—two days—he would accept a medical certificate of health if filed within ten days. Notice of this letter was sent to appellant by the recording secretary, but was never received by the applicant, who had died December 19.

J. Kyles, for plaintiff.

J. Tytler and C. J. McCabe, for defendants.

LOUNT, J., held, that the action of the court in initiating the applicant after the expiration of the thirty days was beyond their agency and illegal and contrary to the constitution of the order. Subordinate courts are the agents of the

order and have no right to waive any of its rules: *Bacon on Life Insurance*, 2nd ed., secs. 117 et seq.; *Heffernan v. Friends*, 29 O. R. 125; *Devine v. Templars*, 22 A. R. 259. Held, also, that some of the answers in the application being untrue, and the application being part of the contract, the plaintiff could not recover: *Russell v. Canada Life*, 8 A. R. at p. 723. Action dismissed with costs; thirty days' stay.

J. Kyles, solicitor for plaintiff.

Tytler & McCabe, solicitors for defendants.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

SOUTHAMPTON LUMBER CO. v. AUSTIN.

Contract—Unascertained Goods—Appropriation—Passing of Property—Acceptance and Part Payment.

Action to recover balance due on a contract for the supply of cedar railway-ties and 5 to 6-inch pole cedar ties f.o.b. at Pine Tree harbour; and also 15,000 unburnt posts and pavements.

Thomas Dixon, Walkerton, for plaintiff.

J. H. Rodd, Windsor, for defendant.

LOUNT, J., held that the defendant had not at any time inspected, accepted, or received the ties, nor was there any selection or appropriation of them by him, nor were they at any time unconditionally appropriated to the contract either by plaintiffs with defendant's assent or defendant with plaintiffs' assent. The contract is for the sale of unascertained or future goods by description—an executory contract—and the rule in such cases is that the property does not pass until goods in a state in which the buyer is bound to accept them are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the latter with the assent of the former: *Chalmers*, 4th ed., p. 43; *Blackburn*, 2nd ed., p. 128; *Heilbutt v. Hiskcon*, L. R. 7 C. P. at p. 449; *Wilson v. Shaver*, 3 O. L. R. at pp. 114-5. The property in the ties never passed. The plaintiffs were always in possession. As to the claim for the posts, however, the plaintiffs should recover. After the posts had been got out the defendant requested the plaintiffs to peel them, and agreed to pay one cent per post. The plaintiffs peeled 10,000, and defendant paid \$200 on account, and on these facts there was a

plain acceptance and waiver of inspection: *Wilson v. Shaver*, supra; *Leggo v. Welland Vale Co.*, 4 O. L. R. 45.

Judgment for plaintiffs for \$700 with costs.

Counterclaim disallowed. Thirty days' stay.

Thomas Dixon, Walkerton, solicitor for plaintiffs.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

SMITH v. WADE.

*Landlord and Tenant—Ejectment—Assignee for Benefit of Creditors
—Contract by Telegram—Mistake.*

On July 9, 1900, the plaintiff demised to Marion Watkins, wife of Frederick Watkins, certain premises in Hamilton, the lease containing a forfeiture clause in the event of assignment for the benefit of creditors. On December 26, 1901, Marion Watkins made an assignment for benefit of creditors to the defendant Wade. At a meeting of creditors, while an offer of the T. H. Pratt Company, Limited, was being considered, Frederick Watkins telegraphed the plaintiff, "If creditors accept my offer for stock, can I promise that lease will be as if no assignment had been made, and that you will not exact penalty clause?"

"My offer" referred to the offer of the Pratt Company, but the plaintiff was not specifically informed of this, and he accepted the offer. Pratt & Company took over the business and the lease. Plaintiff, then, brought action against Wade, the assignee for benefit of creditors, and Pratt & Company for ejectment.

G. F. Shepley, K.C., and C. W. Bell, Hamilton, for plaintiff.

A. B. Aylesworth, K.C., for defendants Pratt & Company.
D'Arcy Tate, Hamilton, for defendant Wade.

LOUNT, J., held that lessees (Pratt & Co.) could stand in no better position than the assignor. The plaintiff has a right as landlord to enforce the forfeiture of the lease, and defendants have made out no case to justify the intervention of the Court to grant relief against the forfeiture: *Barrow v. Isaacs*, 1 Q. B. D. 417; *Eastern Telegraph Co. v. Dent*, 1 Q. B. D. 835.

Judgment, accordingly, for the plaintiffs with costs. Reference as to mesne profits and damages.

Bell & Pringle, Hamilton, solicitors for the plaintiff.

Carscallen & Cahill, Hamilton, solicitors for the defendant Wade.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

GOULET v. GREENING.

Bankruptcy and Insolvency—Fraud—Power of Attorney.

Action brought by plaintiff, a creditor of one Richmond, to have it declared that certain payments to defendants Greening & Co. of moneys received by Richmond from insurance companies in payment of policies covering his stock of goods destroyed by fire in Portage la Prairie, Manitoba, were in fraud of creditors and unjust preferences.

G. Lynch-Staunton, K.C.; and R. R. Bruce, Hamilton, for plaintiff.

G. H. Watson, K.C., and S. C. Smoke, for defendants Greening & Co. and Garland.

W. D. McPherson, for defendant Matchett.

LOUNT, J., held, that the moneys in question were paid by defendant Matchett, who held a power of attorney from Richmond when the latter went to Scotland, in the ordinary way of trade and business and without collusion or fraud or intent to defeat or delay Richmond's creditors, and upon these and other findings, following *Molsons Bank v. Halter*, 18 S. C. R. 88, *Stephens v. McArthur*, 19 S. C. R. 446, *Davidson v. Fraser*, 28 S. C. R. 272, the action is dismissed with costs. Thirty days' stay.

Bruce, Burton, & Bruce, Hamilton, solicitors for plaintiff.

Watson, Smoke, & Smith, solicitors for defendants Greening & Co. and Garland.

T. C. Haslett, Hamilton, solicitor for defendant Matchett.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

ANDERSON v. ELGIE.

Dower—Assignment of—Fraud of Mortgagor—Mistake—Subrogation—Merger.

Action for dower in the east half of lot 27 in the 5th concession of the township of Luther, the plaintiff relying on a deed dated 30th September, 1881, in which Sarah Morrison, wife of John Morrison, granted to the plaintiff all her dower rights which she might have in the above premises if she survived her husband. The deed to the plaintiff was registered subsequent to the registration of a mortgage from Morrison to the Agricultural Loan and Savings:

Company, in which Sarah Morrison did not join to bar dower.
J. Bicknell, K.C., for the plaintiff.

R. A. Bayly, London, for the defendant.

LOUNT, J., held that the plaintiff does not lose any rights or title acquired by his deed by reason of the fact that the mortgagees were deceived by the mortgagor's declaration to them that he was a widower. It was not a case of mistake on the part of the Agricultural Loan and Savings Company, and the facts do not come under the principle and reasoning in *Brown v. McLean*, 18 O. R. 533, and therefore the doctrine of subrogation cannot apply, and the doctrine of merger does not apply: *Armour on Real Property*, p. 235.

Morrison died on the 19th February, 1901; his widow Sarah Morrison is now living. The defendant has refused the plaintiff's demand that dower be set apart.

Judgment for the plaintiff. Reference directed to ascertain and settle dower, arrears of dower, and damages for detention of dower. Costs to the plaintiff; further directions and costs reserved. Thirty days' stay.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

HAIGHT v. DANGERFIELD.

Will—Construction of—Executors—Mortgage—Covenant for Payment—Possession.

Action brought by the executors of Samuel Haight, deceased, against Arthur Eugene and Richard Dangerfield for sale and payment of the balance due on a certain mortgage, and for judgment against the mortgagors on their covenant, and for immediate possession, and for construction of the will of James Dangerfield, deceased, father of the mortgagors.

J. V. Teetzel, K.C., and G. C. Thomson, Hamilton, for plaintiffs.

W. H. Barnum, Dutton, for the adult defendants.

John Hoskin, K.C., for the infant defendants.

LOUNT, J., held, that the adult and infant defendants were improperly made parties. Action against them dismissed with costs. Costs of the infant defendants fixed at \$25. Question of title need not be considered at this stage, because a complete change through death might take place before the parties came before the Master. The plaintiffs, however, are entitled to judgment for immediate pos-

session of the mortgaged premises, and to a reference to the local Master at Hamilton to take the accounts, and the plaintiffs are entitled to judgment against the mortgagors for the amount found to be due on the account, with costs to be added to the mortgage account. Further directions and costs reserved. Thirty days' stay.

Teetzel, Harrison, & Lewis, Hamilton, solicitors for plaintiff.

W. H. Barnum, Dutton, solicitor for defendants.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

WASON v. DOUGLAS.

Trespass—Boundaries—Injunction.

Action for damages for trespass and for injunction restraining defendant from further trespassing on plaintiff's land, part of lot 12 in the 1st concession of the township of Dummer in the county of Peterborough. Both plaintiff and defendant derive title from a common grantor, their respective paper titles being undisputed. The main question is as to the true boundary line between the land of each party.

G. H. Watson, K.C., and G. Edmison, K.C., for plaintiff.

E. B. Edwards, K.C., for defendant.

LOUNT, J., held, that the middle of the creek or stream called the Blind Creek is the true and correct southerly limit or boundary of the plaintiff's land, and that such limit runs along the middle of the most southerly of the said channels at high water mark.

Judgment for the plaintiff for \$5 and costs. Thirty days' stay.

Edmison & Dixon, Peterborough, solicitors for plaintiff.

E. B. Edwards, Peterborough, solicitor for defendant.

LOUNT, J.

AUGUST 15TH, 1902.

CHAMBERS.

McAVITY v. MORRISON.

Patent for Invention—Trade Mark—Contract for Right to—Breach of—Counterclaim—Injunction.

Motion by plaintiffs to strike out matters pleaded by way of defence and set up by counterclaim. Action for damages and injunction restraining defendants from advertising and

representing that they are the authorized representatives of the plaintiffs the Hancock Inspirator Co. for the sale or manufacture of locomotive inspirators in the Dominion of Canada. The plaintiffs McAvity claim under an agreement made in 1901 with the plaintiff company to have the exclusive right of manufacture, etc., for the Dominion. The defendants set up an agreement made in 1886 with the company and one Morrison, and assigned to them, giving them the right to so manufacture and sell, and counterclaim for its breach and to have the plaintiffs' patent and trade marks declared invalid.

D. L. McCarthy, for plaintiffs.

G. H. Watson, K.C., for defendants.

LOUNT, J., held, that it cannot be said that the pleadings in question do not disclose a reasonable ground of defence, or that the counterclaim is frivolous or vexatious.

Bank of Hamilton, v. George, 16 P. R. 418, approved.

Costs in the action to defendants.

(Affirmed by a Divisional Court, 8th Sept.)

LOUNT, J.

AUGUST 15TH, 1902.

WEEKLY COURT.

RE LETHBRIDGE.

Infant—En Ventre sa Mère — Insurance — Period of Distribution — Trustee Relief Act.

Motion by trustees under the Trustee Relief Act for an order determining whether an infant *en ventre sa mère* at the death of her father is entitled to share in certain moneys, proceeds of policies of life insurance. Under the policy the moneys were payable "to his widow, A. Lethbridge, and his children in equal shares." The insured died April 22, 1897, and the infant was born on August 7, 1897, and is now living.

J. S. Robertson, St. Thomas, for the trustees.

F. P. Betts, London, for infant.

LOUNT, J., held that the infant is entitled to share in the proceeds of the policy : Jarman, 5th ed., p. 1041. Pain v. Miller, 6 Ves. Jr. 349, Whitehead v. St. Johns, 10 Ves. Jr. 152, Re Knapp, 1 Ch. D. 91, do not support the proposition that the period of distribution of the moneys arose at the time of the vesting, which was at the death of the father, and, therefore, that the infant not being "in esse" could not take. In those cases the period of distribution is fixed; in this case it is not fixed. Costs out of estate.

LOUNT, J.

AUGUST 15TH, 1902.

WEEKLY COURT.

RE WICKETT.

Solicitor—Costs—Consolidation of Actions.

Appeal by the client from the certificate of the taxing officer at St. Thomas allowing costs of two actions upon a taxation between solicitor and client. The appellant contended that the solicitor should have consolidated her two actions into one, alleging that both actions rested on the same transactions.

F. A. Anglin, K.C., for appellant.

Shirley Denison, for respondent.

LOUNT, J., held, that the officer was right: see *Niagara Grape Co. v. Nellis*, 13 P. R. 181, 258, per Osler, J.A., and Street, J. The questions in the two actions were not all substantially the same. The fact that the cases were tried together does not advance this. The nature of the actions must be considered, the facts before the solicitor, the pleadings in both actions, and the evidence in preparing for trial, to determine the solicitor's course. A change of solicitors took place after issue of writs, but before appearance, but neither at this stage nor any stage before trial would the solicitor have been justified in moving to consolidate, nor would it have been ordered, and consolidation is a matter of discretion, and made as a favour to and for the benefit of defendants. The solicitor acted with reasonable judgment and discretion in not moving to consolidate, and should not be deprived of his costs. See *Smith v. Harwood*, 17 P. R. 36. Appeal dismissed with costs.

Murphy, Sale, & O'Connor, Windsor, solicitors for appellant.

McLean & Cameron, St. Thomas, solicitors for respondent.

LOUNT, J.

AUGUST 15TH, 1902.

TRIAL.

BAXTER v. JONES.

Contract—Negligent Performance—Fire Insurance—Compromise.

Action for damages sustained by plaintiffs through the negligence of defendant, who promised and undertook with plaintiffs, that if certain insurances against loss by fire were effected through him he would see after the insurance and

the correctness of the policies, and give all the necessary notices of any changes that might be made. Subsequently the plaintiffs made changes through defendant, and placed \$500 of further insurance through defendant, who neglected to notify the companies of the additional risk, and after a fire the companies adjusted, and plaintiffs compromised with them for \$1,000.

W. R. Riddell, K.C., and L. F. Stephens, Hamilton, for plaintiffs.

G. F. Shepley, K.C., and S. F. Washington, K.C., for defendant.

LOUNT, J., held, that the defendant had approved of the compromise; and that having undertaken the duty of giving notice, etc., and proceeded with it, he was liable for misfeasance: *Cass v. Barnard*, 2 Raym. 910, referred to in 1 Sm. L. C. 182; *Stratton v. London, etc., R. W. Co.*, L. R. 2 C. P. 631, per Wills, J.; *Addison on Contracts*, 9th ed., p. 789. Judgment for plaintiffs for \$1,000 and costs.

Lees, Hobson, & Stephens, Hamilton, solicitors for the plaintiffs.

Washington & Beasley, Hamilton, solicitors for the defendant.

FALCONBRIDGE, C.J. AUGUST 18TH, 1902.
WEEKLY COURT.

JAMIESON v. MACKENZIE, MANN, & CO.

Injunction—Practice as to Interlocutory Injunctions—Completion of Elevator—Delivery of Possession—Rights of Parties.

Motion to continue an injunction granted August 5, 1902. The plaintiff is an elevator engineer and contractor, and entered into a contract with the defendants to build an elevator at Port Arthur, Ont. This contract, the plaintiff alleges, was not the real agreement between the parties, but was entered into under protest. The plaintiff, however, has completed the elevator with the exception of a few details, and the injunction was obtained to restrain the defendants from interfering with the elevator building in any way, or the plaintiff or his servant until August 13, 1902. The plaintiff contends that the defendants have no right to interfere until it is shewn by an inspection of the building that it fulfils the plans and specifications.

Wallace Nesbitt, K.C., and C. A. Moss, for plaintiff.

A. W. Anglin, for defendants.

FALCONBRIDGE, C.J., held, that this was not a case for an interlocutory injunction. The elevator is the property of the defendants, and they have acted bona fide in endeavouring to do what they consider to be necessary for the protection and preservation of their property. He referred to *Smith v. Peters*, L. R. 20 Eq., per Jessel, M.R., at p. 513, as to practice with regard to interlocutory injunctions, and *Finlay v. Chirney*, 20 Q. B. D. at p. 498.

Injunction dissolved. Costs in the cause unless trial Judge otherwise orders.

F. H. Keefer, Port Arthur, solicitor for plaintiff.

Blake, Lash, & Cassels, solicitors for defendants.

FALCONBRIDGE, C.J.

AUGUST 19TH, 1902.

TRIAL.

THOMPSON v. TOWNSHIP OF YARMOUTH.

Contract—Quasi-contract — Municipality—Non-repair — Indictment.

Action by plaintiff on behalf of himself and other ratepayers. The plaintiff alleges a contract or quasi-contract between himself and other ratepayers and the defendants, made on or about January 16, 1892, by which the defendant corporation agreed to maintain and repair Hughes street bridge, to be used as an egress to and exit from St. Thomas. The plaintiff seeks specific performance of the contract, and a declaration that the defendant corporation is liable to maintain and repair the approaches to Hughes street bridge, and a mandamus compelling the defendant corporation to repair and maintain same, or in the alternative the plaintiff claims the return of certain moneys which he paid to the defendants towards a fund to purchase an approach to the bridge

J. H. Moss, for plaintiff.

J. M. Glenn, K.C., for defendants.

FALCONBRIDGE, C.J., held, that the plaintiff cannot maintain this action, because individually he has no interest in the matter except as a ratepayer of the township. An indictment is probably the appropriate remedy. Held, further, that the defendant corporation cannot lawfully enter into the contract alleged by the plaintiff, and that the representations which the plaintiff claims were made to him, and the conversations in 1891 with the then reeve and deputy reeve were not of such a character as to bind the defendant corporation. Action dismissed with costs. Thirty days' stay.

McCrimmon & Wilson, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendants.

FALCONBRIDGE, C.J.

AUGUST 21ST, 1902.

TRIAL.

HOLDEN v. TOWNSHIP OF YARMOUTH.

Railway—Negligence of Servants—Crossing—Non-repair of Road—Municipal Corporation—Damages—Loss of Consortium.

Action tried at St. Thomas brought by the plaintiff for \$8,000 damages for injuries received by him and his wife, while driving across the Michigan Central Railway tracks on Talbot street, near St. Thomas. Plaintiff alleges that accident was caused by the non-repair of the township road and the negligence of the servants of the railway company.

W. R. Riddell, K. C., and C. F. Maxwell, St. Thomas, for plaintiffs.

J. M. Glenn, K.C., and W. L. Wickett, St. Thomas, for defendant Township.

D. W. Saunders and E. C. Cattnach, for defendants the Michigan Central Railway Company.

Angus MacMurchy, for defendants the Canadian Pacific Railway Company.

FALCONBRIDGE, C.J., held that the plaintiff was entitled to damages. The accident was due to some sudden noise of the railway cars as the plaintiff crossed the tracks which startled the horse, and to the absence of a necessary railing at that point on the highway. *Toms v. Whitby*, 35 U. C. R. 195, *Sherwood v. Hamilton*, 37 U. C. R. 410, approved of in *Foley v. East Flamborough*, 26 A. R. 43, *Bell Telephone Co. v. Chatham*, 31 S. C. R. 61, referred to. Damages to male plaintiff \$50 for his own injury, \$350 for loss of consortium and service, to female plaintiff, \$1,200. Judgment accordingly with costs. Thirty days' stay.

Maxwell & Maxwell, St. Thomas, solicitors for plaintiff.

W. L. Wickett, St. Thomas, solicitor for defendant township.

Kingsmill, Hellmuth, Saunders, & Torrance, solicitors for Michigan Central R. W. Co.

MacMurchy, Denison, & Henderson, solicitors for Canadian Pacific R. W. Co.

FALCONBRIDGE, C.J.

AUGUST 21ST, 1902.

TRIAL.

SCOTT v. BARRON.

Private Way—Building—Mandatory Injunction.

Action tried at Sandwich brought by the plaintiff for an injunction restraining defendants from further proceeding with the erection of a building on a strip of land used as a highway, which the plaintiff claims as belonging to him. Plaintiff also seeks a mandatory order directing defendants to remove the building and all other obstructions placed on the land in question.

J. H. Rodd, Windsor, for plaintiff.

D. R. Davis and F. Davis, Amherstburg, for defendants.

FALCONBRIDGE, C.J., held, that the evidence does not establish that the strip of land in question is a public highway, and, moreover, the structure is no obstruction to the free passage of traffic along the said strip, since it is constructed over a depression which forms no part of the travelled road. The deed by the predecessors in title to the plaintiff, dated December 5th, 1873, granted the said strip "to be used as a carriage way by all the parties hereto forever."

Action dismissed without costs. Judgment for defendants for \$25 damages by reason of injunction. Thirty days' stay.

Fleming, Wigle, & Rodd, Windsor, solicitors for plaintiff.

Davis v. Davis, Amherstburg, solicitors for defendants.

FERGUSON, J.

AUGUST 22ND, 1902.

WEEKLY COURT.

LAW SOCIETY OF UPPER CANADA v. HUTCHISON.

Bankruptcy and Insolvency—Assignee—Further Directions.

Motion for further directions. Judgment for the plaintiffs in the original action against the defendants Rowsell & Hutchison for \$4,287.90. Plaintiff by original action granted subsequent costs.

Hamilton Cassels, K.C., for plaintiff.

George Bell, for defendant Clarkson.

FERGUSON, J.

AUGUST 22ND, 1902.

TRIAL.

LAWRENCE v. TOWN OF OWEN SOUND.

Water and Watercourses — Municipal Corporation — Acting without By-law.

Action tried at Owen Sound, brought by the plaintiff, a market-gardener living in Owen Sound, to recover damages for injury to his lands caused by water flowing through a cutting constructed by the defendants without the authority of a by-law.

W. S. Middlebro, Owen Sound, for plaintiff.

G. F. Shepley, K.C., and J. W. Frost, Owen Sound, for defendants.

FERGUSON, J., held, that the defendant corporation are liable for damages. Reference to ascertain the amount thereof. Judgment accordingly with costs.

W. S. Middlebro, Owen Sound, solicitor for plaintiff.

J. W. Frost, Owen Sound, solicitor for defendant corporation.

FERGUSON, J.

AUGUST 22ND, 1902.

TRIAL.

MCDONALD v. HENNESSY.

Fraudulent Conveyances — Good Consideration — Administrator ad Litem.

Action brought by the plaintiff to set aside certain conveyances made by the defendant to his wife as fraudulent and void and intended to defeat, hinder, and delay creditors. The plaintiff, in July, 1901, recovered a judgment against defendant for \$1,074.83, for money lent in 1896. In September, 1892, October, 1892, and April, 1893, the defendant purchased land and conveyed to his wife voluntarily without valuable consideration. His wife died in March, 1900, and the defendant has been appointed administrator ad litem of her estate. In January, 1892, defendant and wife made a voluntary conveyance of all their lands to defendant A. L. Cameron, the defendant Hennessy's daughter. The defendant A. L. Cameron, at defendant Hennessy's request, mortgaged part of the said lands for \$700, with which money Hennessy purchased a boat.

A. C. Boyce, Rat Portage, for plaintiff.

F. A. Anglin, K.C., for defendant.

FERGUSON, J., held, that the evidence failed to shew that at the time of the conveyances in question any debts were owing by the defendant Hennessy, except a debt fully secured by mortgage, since satisfied.

Held, also, that there is no evidence of fraudulent intent nor efforts from which fraudulent intent can be inferred. The conveyances to the defendant's wife cannot be disturbed, and consequently the conveyance by her to her daughter Mrs. Cameron cannot be upset.

Action dismissed with costs.

Boyce & Draper, Rat Portage, solicitors for plaintiff.

Moran & Mackenzie, Rat Portage, solicitors for defendant.

FERGUSON, J.

AUGUST 22ND, 1902.

TRIAL.

RUTTAN v. BURK.

Assessment and Taxes—Sale for Arrears—Assessment Act, 1892—Tax, when Due.

Action brought by plaintiff to have it declared that the sale of certain lands in Port Arthur for alleged arrears of taxes for 1892, 1893, and 1894 was illegal and void. The by-law of the municipality number 354 imposing the taxes and fixing the rate was passed October 18th, 1892. It was also objected that the plaintiff has no status to maintain the action.

R. C. Clute, K.C., for plaintiff.

F. A. Anglin, K.C., for defendant.

FERGUSON, J., referred to Assessment Act of 1892, latter part of sec. 140 and to sec. 160; and held that what these sections really mean is that the taxes for the year 1892 must be declared to have been due before they were imposed by the said by-law (354), and in this view a part of the taxes for which these lands were sold was in arrear for three years; and again the legislature by 63 Vict. ch. 86, validated sales of lands for taxes in Port Arthur prior to January 1, 1899; consequently the sale was a good sale. Held, also, that in this view of the sale, it is unnecessary to consider the question raised of the status of the plaintiff in the action and his right to maintain it.

Action dismissed with costs.

W. A. Leys, Port Arthur, solicitor for plaintiff.

David Mills, Port Arthur, solicitor for defendant.

FERGUSON, J.

AUGUST 22ND, 1902.

TRIAL.

DUPRAT v. DANIEL.

Lease—Fraud in Obtaining—Executed on Sunday—Lessor Signing Improvidently without Independent Advice.

Action to have a certain indenture of lease declared void for fraud, misrepresentation, and deceit, and because it was executed on Sunday, and improvidently, without independent advice. At the trial the allegation of fraud was abandoned.

J. B. Rankin, K.C., for plaintiff.

J. A. Walker, K.C., for defendant.

FERGUSON, J., held, that improvidence and want of independent advice cannot support the plaintiff's case, as these are only circumstances which have been regarded as in a special degree marks of undue influence and fraud: May on Fraudulent Conveyances, 2nd ed., p. 496. Held, also, that the present case does not come within R. S. O. ch. 119, sec. 7, or R. S. O. ch. 246, sec. 9; that the lease was not made on Sunday, at the time of its actual execution, but many days before.

Action dismissed with costs.

Lewis & Richardson, Chatham, solicitors for plaintiff.

J. A. Walker, Chatham, solicitor for defendant.

AUGUST 22ND, 1902.

DIVISIONAL COURT.

MASON v. LINDSAY.

Replevin—Conditional Sales Act—Contract of Hiring with Option to Purchase.

An appeal from judgment of LOUNT, J., in a replevin action tried at London, November 4th, 1901, in respect of a piano belonging to the respondents, which was in the possession of one Thody under an agreement between him and the respondents at the time he mortgaged it to the appellant. The question was whether the respondents were prevented from setting up their title to the piano as against the appellant by reason of the Conditional Sales Act, R. S. O. ch. 149. The respondents, the Mason & Risch Piano Co., Limited, Toronto, were the manufacturers of the piano, and the words "Mason & Risch" were stamped on it.

Joseph Montgomery, for appellant.

J. S. Johnston, for respondents.

The judgment of the Court (MEREDITH, C.J., FERGUSON, J.) was delivered by

MEREDITH, C.J.:—The respondents were the manufacturers of the piano, and their corporate name is The Mason & Risch Piano Company, Limited, and their place of business, Toronto, and there was admittedly a sufficient compliance with the provisions of the Act to which I have referred if stamping of the words "Mason & Risch," Toronto, was a stamping on the piano of the name and address of the manufacturer, bailor, or vendor within the meaning of sec. 1.

I have no doubt that stamping the piano with the name "Mason & Risch" afforded all the means of information to intending subsequent purchasers or mortgagees that the legislature intended to be placed within their reach by the requirements of sec. 1, as to the name of the manufacturer, bailor, or vendor, but unfortunately, as I think, the legislation does not permit of the Court holding that anything other than that which it has prescribed as necessary shall be a compliance with the statute, even though that which is done is in the opinion of the Court as effective for the end which the Legislature intended to attain as that which it has required to be done to protect the common law right of the owner of the chattel.

The decided cases on analogous statutes in my opinion compel us to give this strict construction to the language of sec. 1: *Low v. Routledge*, 33 L. J. Ch. 717; *Penrose v. Marty*, El. B. & El. 499; *Atkin & Co. v. Wardle*, 61 L. T. N. S. 23; *Nassau v. Tyler*, 70 L. T. N. S. 376.

The provisions of the agreement material to this inquiry are:

(1) The acknowledgment of the receipt by Thody from the respondents of the piano and a stool and drape, the value of which is stated to be \$300.

(2) That they are received on hire for 43 months at \$7 per month, payable in advance.

(3) That the \$300 is to be paid by Thody in the event of the piano being injured, destroyed, or not returned to the respondents on demand in good order, reasonable wear and tear excepted.

(4) That it is agreed that Thody may purchase the piano, stool, and drape for \$300, payable in instalments of \$25 per three months from date until the whole is paid with interest.

(5) But that until the whole purchase money and interest be paid the piano, stool, and drape shall remain the property

of the respondents on hire by Thody, and shall not be removed from the premises at which they were then delivered without the written consent of the respondents.

(6) That in default of payment of any instalment of the purchase money or of the monthly rental, or in case the piano should be removed or any attempt made or threatened to move it from the premises mentioned without the necessary consent being given, the respondents might resume possession of the property, the agreement for sale being declared to be conditional and punctual payment essential to it.

(7) That if possession should be resumed all instalments of rent to the date of possession being taken should be forthwith paid by Thody to the respondents, together with the damages which the piano might have sustained beyond ordinary wear and tear, and certain expenses, but that any sum received on account of purchase money beyond the rent due and the costs and expenses should be returned to Thody.

(8) That on payment in full of the purchase money and interest no rent or hire was to be charged to Thody.

It will be seen from this synopsis of the agreement that the contract is one of hiring only with the option to Thody of purchasing for \$300, and that in the event of his electing to purchase and paying the purchase money and interest in full he is to be charged no rent, which may mean that he is thereafter to be charged no rent, or, possibly, that any payments of rent which shall have been made are to be credited on the purchase money, and no further payments of rent exacted.

Thody does not appear to have elected to purchase, and therefore was never in possession of the piano under a contract of purchase, but always as the hirer of it for the unexpired portion of the forty-three months at the rent mentioned in the agreement.

Upon the whole, in my opinion, the judgment in favour of the respondents is right and ought to be affirmed and the appeal from it dismissed with costs.

Arnoldi & Johnston, Toronto, solicitors for the respondents.

J. A. Robinson, St. Thomas, solicitor for the appellant.

OSLER, J.A.

AUGUST 22ND, 1902.

C. A.—CHAMBERS.

RE LINCOLN PROVINCIAL ELECTION.
McKINNON v. JESSOP.

Parliamentary Election—Petition—Electoral District—Description of.

Motion by the respondent to set aside the petition and all subsequent proceedings for defect or irregularity. The objection was that there was no such provincial electoral district as Lincoln and Niagara, and therefore no such election.

W. D. McPherson, for respondent, contended that the mistake was fatal to the petition.

R. A. Grant, for the petitioner, while not admitting this, moved for leave, on terms, to amend.

OSLER, J.A.:—I can take judicial notice of the fact that a general provincial election was held in the month of May last, and that a person named Elisha Jessop was returned as having been duly elected thereat to represent the electoral district of the county of Lincoln in the Legislative Assembly of the Province: Ontario Gazette. The affidavit of the respondent filed in support of the motion shews that he is that person. •

There having been at the time mentioned in the petition an election for the electoral district of Lincoln at which the respondent was elected, and there being no electoral district of Lincoln and Niagara, I think the words "and Niagara" used in describing or stating the place or electoral district for which the election complained of was holden, and the respondent elected, ought to be regarded as being merely surplusage, or at most a harmless misdescription not fatal to the proceedings, even in the absence of an amendment.

I give the petitioner leave to amend accordingly. I do not think it necessary to say more about the cases of Maude v. Lowby, L. R. 10 C. P., or Aldridge v. Hurst, 1 C. P. D. 410, 417, or Norwich Election, 80 L. T. Jour. 253 (1886), which are always cited on applications of this kind and in which leave to amend was refused, than that they do not touch a case like this. They merely decide that an amendment which in effect seeks to make a new petition will not be allowed after the time for filing the petition has expired.

The petitioner takes an order to amend by striking out of the proceedings the words "and Niagara." I dismiss the application. The costs will be costs in the cause to the re-

spontent in any event, and over and above any other costs which he may ultimately become entitled to.

Kerr, Davidson, Paterson, & Grant, Toronto, solicitors for the petitioner.

Lancaster & Campbell, St. Catharines, solicitors for the respondent.

FERGUSON, J.

AUGUST 25TH, 1902.

WEEKLY COURT.

BANK OF OTTAWA v. MCLEOD.

Fraudulent Conveyance—Injunction—Receiver—Money in Custodiâ Legts.

Motion by the plaintiffs for judgment in an action to have a certain conveyance declared void as against them and for an account, injunction, and receiver. In March, 1902, the plaintiffs issued execution against the defendant W. A. McLeod. McLeod had on January 10th, 1901, conveyed his lands in Rat Portage to the defendant Mary McLeod. She mortgaged the lands for \$1,608.96 on January 15th, 1902. On May 1st, 1902, the defendant W. A. McLeod was arrested in Winnipeg on the charge of unlawfully removing his property to defraud creditors, and when arrested \$1,808.96 was found on his person and placed in the hands of the clerk of the peace. The plaintiffs alleged that this sum consisted of the aforesaid \$1,608.96 and the sum of \$200 received by McLeod from the sale of certain stock. The plaintiffs desired to have it declared that the said deed by the defendant W. A. McLeod to the defendant Mary McLeod was fraudulent and void as against them. They desired, also, to have an account of the defendant Mary McLeod's dealings with the land and to have it declared that the sum of \$1,808.96 was the defendant W. A. McLeod's property and liable to their claim, and they desired an injunction to prevent the defendants interfering with the said sum of \$1,808.96, and to have a receiver appointed as to the money found with McLeod at the time of his arrest.

F. A. Anglin, K.C., for plaintiffs.

J. S. Ewart, K.C., for defendant.

FERGUSON, J., held, that an injunction should be granted restraining the defendant from interfering with the sum of \$1,608.96, although it is in custodiâ legis: *Lloyd v. Eagle*, 28 L. J. Ch. 389, and *High on Injunctions*, sec. 402 et seq. Receiver also appointed in regard to \$484.44, the amount remaining due to plaintiffs.

Boyce & Draper, Rat Portage, solicitors for plaintiffs.

T. R. Ferguson, Rat Portage, solicitor for defendant.

FERGUSON, J.

AUGUST 26TH, 1902.

TRIAL.

LAISHLEY v. GOULD.

Contract—Wrongful Dismissal—Subsequent Employment during Period Originally Contracted for—Damages.

Action brought by the plaintiff for wrongful dismissal. Plaintiff entered into a contract on December 3rd, 1897, with the defendants the Gould Bicycle Co. of Branford to act as manager for three years at a salary of \$20 per week and a percentage on money sent to the defendants for sales. At the end of the second year of his service, the defendants sold their business and dismissed the plaintiff through no fault of his. Plaintiff sues for \$1,140, salary for one year and six weeks, and for three per cent. on collections from sales, his total claim amounting to \$2,220.

G. H. Watson, K.C., and S. C. Smoke, for plaintiff.

Wallace Nesbitt, K.C., and H. S. Osler, for defendants.

FERGUSON, J., held, that the plaintiff would be entitled to this amount, had he not immediately on being dismissed obtained appropriate employment in which during the said period of one year and six weeks he was paid \$3,300. This amount would in the ordinary case be subtracted from the damages recovered for wrongful dismissal, but here it exceeds the amount of the damages and consequently there are no damages coming to him.

Action dismissed with costs.

Watson, Smoke, & Smith, solicitors for the plaintiff.

McCarthy, Osler, Hoskin, & Creelman, solicitors for defendants.

ROBERTSON, J.

AUGUST 27TH, 1902.

TRIAL.

SPOONER v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

Life Insurance—Validity of Policy—Lien against—Transferred Policy—Acceptance of Premium as Evidence of Contract—Foreign Companies—License to do Business in Canada.

Action tried at St. Catharines. Plaintiff is the widow of George Spooner and alleges she is entitled to \$1,000 due on a policy payable to her if she survived her husband. He died on or about March 18th, 1901. He took out a policy with the Covenant Mutual dated September 9th, 1895. This policy was transferred by the Covenant Mutual to the North

Western Life of Chicago December 29th, 1899, and they transferred it to defendants, August 1st, 1900. On September 10th, 1900, Spooner received a circular letter from the defendant company stating that they assumed every policy or certificate in good standing on September 1st, 1900, upon the legal reserve basis, the reserve so far as it had not been paid in cash to be a lien against the insurance. On September 14th, 1900, Spooner paid a premium to defendants which was accepted by them. On January 14th, 1901, the defendants issued Spooner a new policy in lieu of the old, a certificate of a lien against it being given by him. Defendants claim that the North Western Life had no license to do business in Canada, that they issued the policy dated Jan. 14th, 1901, by mistake, thinking it a North Western Life Policy, which they submit it was not, that they received said premium by mistake, and that policy was obtained by Spooner and his wife by fraudulent misrepresentations and without consideration.

G. F. Shepley, K.C., and J. C. Rykert, K.C., for plaintiff.

G. T. Blackstock, K.C., for defendants.

ROBERTSON, J., held, that the defendants had not been fraudulently dealt with by the plaintiff and her husband, and that this is not a contest between two companies as to which should pay plaintiff her claim, but a case of contract between plaintiff as beneficiary under the original policy, or under the new policy dated January 14th, 1901, and the defendant company.

The plaintiff is entitled to recover, but her dealings were not altogether fair in their character, and consequently she will have to pay costs. She is entitled to \$1,000 less lien against the policy. Reference as to any additional loan or charges.

J. C. Rykert, St. Catharines, solicitor for the plaintiff.

MacMurchy, Denison, & Henderson, Toronto, solicitors for the defendants.

FALCONBRIDGE, C.J.

AUGUST 28TH, 1902.

TRIAL.

SAUNBY v. LONDON WATER COMMISSIONERS.

Water and Watercourses — Prescription — Mandatory Injunction — Damages.

Action for injunction, mandatory order, and damages. Plaintiff is the owner of lands bordering on the river

Thames, and alleges that in 1879 and 1880 the defendants obstructed the flow of the river by erecting and maintaining a dam and flash-boards in the river bed which forced back the water so that it was prevented from flowing away from his land and remained at his mill and in his tail-race, compelling the use of steam instead of water power at times. He claims damages for these alleged wrongs, an injunction to prevent a continuance of them and a mandatory order directing the removal of the dam and flash-boards.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiff.

A. B. Aylesworth, K.C., for city of London.

T. G. Meredith, K.C., for Water Commissioners.

FALCONBRIDGE, C.J., held, that the defendants are in the wrong, and have not acquired a prescriptive right. Plaintiff is entitled to damages both as riparian proprietor and mill-owner. Judgment, accordingly, for plaintiff with costs and reference as to damages, to be confined to the six years prior to the commencement of this action. Injunction granted. Thirty days' stay.

Hellmuth & Ivey, London, solicitors for the plaintiff.

T. G. Meredith, London, solicitor for the defendants.

FALCONBRIDGE, C.J.

SEPTEMBER 3RD, 1902.

TRIAL.

HOGG v. TOWNSHIP OF BROOKE.

*Way — Non-repair — Injury to Person — Accumulation of Snow—
Responsibility of Township Corporation.*

Action for damages for injuries received by plaintiff owing to non-repair of a highway in the township. The snow accumulated on the highway, and the plaintiff's sleigh stuck in the snow, and in endeavouring to extricate it the plaintiff was injured.

T. G. Meredith, K.C., for plaintiff.

G. F. Shepley, K.C., and J. Cowan, Sarnia, for defendants.

FALCONBRIDGE, C.J.:—It would be unreasonable to hold the defendants liable owing to the unprecedented fall of snow at the particular season when the accident occurred, it being

practically impossible for them to keep the 80 miles of roadway within the township free of snow. Action dismissed with costs.

Meredith & Fisher, London, solicitors for plaintiff.

Cowan & Towers, Sarnia, solicitors for defendants.

WINCHESTER, MASTER.

SEPTEMBER 5TH, 1902.

MACKAY v. COLONIAL INVESTMENT AND
LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside.

Motion by defendants resident in Toronto and Montreal respectively for an order setting aside the writ of summons, the order permitting service thereof outside of Ontario, and the service of the writ.

The plaintiffs resided in Nova Scotia. The defendants were: The Colonial Investment and Loan Company, duly incorporated and having their head office in Toronto, Ontario; the Montreal Loan and Investment Company, duly incorporated and having their head office in the Province of Quebec; and the liquidators of the Montreal Loan and Investment Company, also residing in the Province of Quebec.

The plaintiffs sued on behalf of themselves and all other shareholders in the Montreal company to set aside certain agreements and resolutions for the sale and transfer of the assets of the Montreal company to the Toronto company, on the grounds that the meeting of shareholders of the Montreal company at which the resolutions were passed was illegal; that the plaintiffs had no notice of such meeting; that there was no public notice of the sale and transfer; and upon the ground of fraud.

The plaintiffs also claimed an account of the assets of the Montreal company received by the Toronto company, restitution thereof, and the appointment of a receiver.

In the alternative, the plaintiffs claimed a proper distribution of the proceeds of the sale of the assets among the shareholders.

A. B. Aylesworth, K.C., for the defendants the Colonial Investment and Loan Company, and W. M. Douglas, K.C., for the other defendants, contended that the Ontario Courts had no jurisdiction over the subject-matter of the action or

to entertain it or grant the relief claimed; that the action ought to have been brought, if at all, in the Province of Quebec; that the Toronto defendants were improperly joined with their co-defendants with the object of giving the Court jurisdiction; that there was no cause of action against the defendants, and the issue of the writ was an abuse of the process of the Court; that the Montreal defendants were not necessary or proper parties as against their co-defendants; that the subject of the action being land in Quebec, the action was improperly brought under such cases as *Merchants Bank v. Gillespie*, 10 S. C. R. 312; *Henderson v. Bank of Hamilton*, 23 S. C. R. 716; *Burns v. Davidson*, 21 O. R. 547; *Purdom v. Pavey*, 26 S. C. R. 412; and that the foreign defendants were improperly served with process before service on their co-defendants.

W. E. Middleton, for the plaintiffs.

THE MASTER IN CHAMBERS:—In my opinion, this is an entirely different action from any of those referred to. This is not brought with reference to real estate in the sense that those actions were, and therefore the principles applied in those cases have no bearing on this application. I refer to *Duder v. Amsterdamsch Trustees Kanton*, [1902] 2 Ch. 132.

With reference to the contention that the Montreal defendants are not necessary or proper parties to this action as against their co-defendants, I cite the remarks of Lindley, L.J., in *Witted v. Galbraith*, [1893] 1 Q. B. 577, at p. 579.

I therefore hold that the writ of summons and order allowing the service out of the jurisdiction were properly issued, and that the applications must be refused. The costs of the motion made by the Colonial company to be costs to plaintiffs in any event, and the costs of the motion by the Montreal defendants to be costs in the cause in consequence of the irregularity in serving them with the writ before serving the Colonial company. I understood that the only question with reference to the service of the writ on this ground was one of costs.

I should have stated that it appears that the Montreal defendants assigned to the Colonial company securities on lands in Ontario to the value of \$1,222.58, and this is in question in this action as an asset of the Montreal company, and therefore Rule 162 (h) may be invoked by the plaintiffs.

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OSLER, J.A.

SEPTEMBER 5TH, 1902.

C.A.—CHAMBERS.

RE EQUITABLE SAVINGS, LOAN, AND BUILDING
ASSOCIATION.

*Appeal—Order under Ontario Winding-up Act—Right of Appeal—
Final Order—Practice—Settlement of Appeal Case.*

Motion by respondent to quash appeal from order of County Judge of York rescinding order previously made by him under sec. 41 of the Ontario Joint Stock Companies Winding-up Act, R. S. O. ch. 222, for the dissolution of this company. The motion to quash was made on the ground that the appeal case had not been settled in accordance with the practice prescribed in the case of appeals from the High Court. The papers were transmitted to the officer of the Court of Appeal and were printed by the appellant, and a copy thereof with reasons of appeal was delivered to the respondent.

A. B. Aylesworth, K.C., for respondent.

C. D. Scott, for appellant.

OSLER, J.A., held that sec. 27 of the Act at present contains the code of procedure in an appeal of this nature. No provision is made in the Consolidated Rules to meet the case. The appellant must proceed with his appeal according to law, i.e., according to what is required by sec. 27. The practice hitherto, when the case has come before a single Judge, has been to send up the original papers and hear the appeal upon them: see *In re D. A. Jones*, 19 A. R. 63; *In re Haggert Co.*, 20 A. R. 597; *Re Cosmopolitan Life Assn.*, 15 P. R. 185.

The order is a final one, and as the appeal is in fact set down for hearing by the Court of Appeal, and not by a single Judge, the point cannot be disposed of in this forum. Motion, consequently, dismissed. Costs to the appellant.

FALCONBRIDGE, C.J.

SEPTEMBER 8TH, 1902.

CHAMBERS.

MERCHANTS BANK OF CANADA v. SUSSEX.

Arrest—Ca. Sa.—Ex Parte Order—Motion to Set aside—Concurrent Writ of Ca. Sa.

Application by defendant for order setting aside ex parte order for issue of writ of ca. sa., on ground of non-disclosure of material facts on the application therefor, and for order setting aside concurrent writ of ca. sa., and the arrest of defendant thereunder, and ordering defendant's discharge from county gaol of county of Lambton, on the ground that the original writ issued upon such order to which the writ under which the arrest was made was concurrent, had expired, and that the concurrent writ had expired before the arrest was made.

J. E. Jones, for defendant.

J. H. Moss, for plaintiffs.

FALCONBRIDGE, C.J., held, that if all the facts as to the arrest had been before the Court, the order of 21st August should still have been made, and that same should not be set aside, and that, as defendant is held under writ issued pursuant to order of 21st August, and not solely under concurrent writ of 16th August, no order should be made on that branch of the motion in the absence of the sheriff. No costs.

SEPTEMBER 8TH, 1902.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

Execution—Motion for Leave to Appeal—Costs of—High Court—Authority to Issue Execution.

An appeal by the defendant from the order of MEREDITH, J., ante 339, 4 O. L. R. 247, was heard by a Divisional Court (FALCONBRIDGE, C.J., STREET, J.).

W. H. Bartram, London, for appellant.

D. W. Saunders, for plaintiffs.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing with the reasons of the Judge in Chambers.

WINCHESTER, Master.

SEPTEMBER 9TH, 1902.

CHAMBERS.

METALLIC ROOFING CO. v. LOCAL UNION No. 30,
 AMALGAMATED SHEET METAL WORKERS'
 INTERNATIONAL ASSOCIATION.

*Parties—Unincorporated Voluntary Association—Motion to Strike
 out Name—Injunction—Trial.*

Motion by the defendant association for an order striking their name from the style of cause and dismissing the action against them, on the ground that they are not an incorporated body, nor are they registered under or by virtue of any law in force in Ontario, but are a voluntary association of sheet metal workers, residing and working in Toronto.

The action was brought in connection with a strike of the employees of the plaintiff company, and was for an injunction to restrain the defendants from unlawfully interfering with the plaintiffs' business, and for damages

J. G. O'Donoghue, for applicants.

W. N. Tilley, for plaintiffs.

THE MASTER.—The same objection was raised in *Massey-Harris Co. v. Woodward*, brought under circumstances similar to those in question herein. In delivering judgment in that action on the 20th March, 1900, Mr. Justice Meredith said:—"A great deal was upon the argument said on the question of the legal status of the union, but that is a matter which can also be better dealt with at the trial, where much more light can be thrown upon the subject. Prima facie the union has some legal existence; a name indicative of such is used by its members; it has a constitution and by-laws; it was formed under a charter of the Iron Moulders' Union of North America, issued under what seems to be the common seal of that body, of which the union in question is apparently a part, and has a full set of company officers. One naturally thinks that the larger body at all events must be incorporated somewhere, or otherwise have some legal existence and capacity (though not yet parties to the action); and it ought not to be difficult to throw a great deal of light upon this question at the trial; very little seems to have been yet afforded, though it seems difficult to perceive anything in the way of making the question plain."

If I may be permitted to state so, the language used by his lordship is similar to that used by me while this motion was being argued, and in ignorance of this judgment, and I have, therefore, no hesitation in adopting his decision.

The motion will, therefore, be refused. Costs to the plaintiffs in the cause.

MACMAHON, J.

SEPTEMBER 10TH, 1902.

CHAMBERS.

RE RITZ AND VILLAGE OF NEW HAMBURG.

Parties—Summary Application to Quash Municipal By-law—Countermand—Motion to Add or Substitute New Applicant.

Motion by John F. Katzenmeier for an order allowing him to be added as an applicant upon a pending summary motion to quash by-law number 259 of the village of New Hamburg, or substituting him for Charles Ritz, the original applicant.

On a petition signed by more than two-thirds of the rate-payers, the council of the village was empowered by 2 Edw. VII. ch. 52, to pass a by-law authorizing the municipal corporation of the village to grant a bonus to the New Hamburg Manufacturing Company, not exceeding \$10,000, and to issue debentures for an amount not exceeding \$10,000, payable during a period not exceeding twenty years.

A by-law was passed by the council in May, 1902, granting the bonus and authorizing the issue of debentures for the sum mentioned and interest thereon.

Ritz, on the 15th August, gave notice of motion to quash the by-law on various grounds appearing in the notice.

On the 26th August Ritz served on the village corporation a notice countermanding the notice of motion to quash; when the countermand was served the time for making a fresh application to quash had expired. (R. S. O. ch. 223, sec. 380.)

Katzenmeier had, on the 22nd August, issued a writ against the corporation of New Hamburg, on which was indorsed a claim for an injunction to restrain the corporation from paying over the \$10,000 to the New Hamburg Manufacturing Company, but no motion was made for an interim injunction; and on the present motion his consent to his

name being substituted for that of Charles Ritz, or to his name being added as one of the applicants, was filed.

E. E. A. DuVernet, for Katzenmeier.

A. B. Aylesworth, K.C., for the corporation.

MACMAHON, J.—The control of the proceedings to quash the by-law rested with Ritz, and when he served notice of countermand on the village corporation the proceedings on his application came to an end. And what Katzenmeier asks is to have his name substituted as an applicant on the motion to quash, when the original applicant has put an end to the proceeding by his notice of countermand.

The authority relied upon by Mr. DuVernet—*McPherson v. Gedge*, 4 O. R. 246—does not support his claim to the order. That was an action under the Mechanics' Lien Act, sec. 15 of which provides that suits brought by a lienholder shall be taken to be brought on behalf of all the lienholders of the same class; and the Court held that upon the death of a lienholder who had brought a suit, or his refusal or neglect to proceed, the suit might by leave of the Court be prosecuted by any lienholder of the same class. There the statute gives express power to the Court to allow a lienholder, under certain circumstances, to intervene and become a party to the suit. And the statute (R. S. O. ch. 223, sec. 231), in case of quo warranto proceedings, permits a new relator to intervene and prosecute. So also where a creditor brings an action on behalf of himself and all other creditors to set aside as fraudulent a conveyance made by his debtor, there, in the event of the plaintiff declining to prosecute the action, another creditor would, on application, be allowed by the Court to intervene, on proper terms as to costs, as the action is framed so as to include such other creditor. And had Ritz in his notice of motion to quash alleged that he was acting not only for himself but for all other ratepayers interested in quashing the by-law, if Ritz refused to proceed with the motion, the Court would, on an application by one of the other ratepayers interested, have permitted him to be joined in the notice of motion as one of the class referred to therein.

Katzenmeier does not even allege that he was one of those who induced Ritz to institute the proceedings to quash.

There is no authority to make the order asked for, and the motion must be dismissed with costs.

BOYD, C.

SEPTEMBER 12TH, 1902.

CHAMBERS.

RE MURRAY.

Will—Devise of Land to Lessee—Contract by Testator with Lessee to Build House—Performance of Contract by Executor Out of Personalty—Remedy in Damages.

Application (heard at Woodstock) by Neil S. Murray, executor of the will of James Murray, late of the township of West Zorra, for an order under Rule 938 declaring the construction of the will and determining certain questions.

All the questions raised were disposed of at the hearing except as to the liability in respect to the building of a house upon the farm devised to John Robert Murray. The testator in his lifetime made a lease of this farm to his son John Robert Murray for five years from 1st March, 1901, at a yearly rental of \$200, payable in October each year, and undertook to build a house on the farm, of certain expressed dimensions, during the first year of the term. There was a provision for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on 19th June, 1902, after the expiry of the first year of the term, but had not built or done anything towards building the house. By his will dated 7th February, 1901, the father devised this farm on certain conditions (not now material) to his son, the lessee; but no reference was made in the will to the lease, which was dated 29th January, 1901, some nine days before the date of the will.

Peter McDonald, for executor.

J. W. Mahon, for John R. Murray.

J. P. Mabee, K.C., for Andrew W. Murray.

A. S. Ball, K.C., for the official guardian.

BOYD, C.—It was argued that the devisee was entitled to have the house built on the land at the expense of the personal estate, and it was counter-argued that at most the devisee as lessee could only get damages for non-performance of the agreement to build. The latter is the better construction. *Cooper v. Jarman*, L. R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished. The common ground of decision in both these cases is that, as there was an existing contract with work partly performed thereon before the

death, it was the duty of the estate to carry out to completion at the cost of the personalty. Here the marked distinction exists that there was no existing contract in course of performance when the testator died. On the contrary, the contract had been broken; the time for performance had elapsed, and nothing had been done in the way of building. A new liability had arisen against the testator for damages because of his non-performance. The contract to build is very vague and is not per se capable of specific enforcement. Had the father lived, the son, as lessee, could have had no relief for the breach other than damages. His death has not enlarged or changed that remedy; and to that the son as lessee or devisee is confined. If the parties can agree to assess the amount of damages, it will save money, time, and perhaps temper.

Peter McDonald, Woodstock, solicitor for the executor.

J. Hoskin, Toronto, official guardian.

Mabee & Makins, Stratford, solicitors for Andrew W. Murray.

Smith & Mahon, Woodstock, solicitors for John R. Murray.

MACMAHON, J.

SEPTEMBER 12TH, 1902.

CHAMBERS.

RE CLARK AND KELLETT.

Landlord and Tenant—Overholding Tenants Act—Right to Terminate Lease—Notice to Quit—Difficult Questions of Law—Refusal of Certiorari.

Motion by W. B. Kellett, the tenant, for an order under sec. 6 of the Overholding Tenants Act, R. S. O. ch. 171, requiring the junior Judge of the County Court of Lambton to send up the proceedings and evidence in this case to the Court, and staying proceedings.

The lessor, Angeline M. Clark, demised a store and premises in Sarnia to Kellett for 5 years from 21st December, 1901, at \$540 a year, payable in monthly payments of \$45 a month, the lease containing a proviso that "the parties hereto may terminate this lease at any time upon giving three months' notice in writing of his or her intention so to do." On the 16th April, 1902, the lessor gave the lessee notice in writing "to quit and deliver up the store and premises which you now hold of me situate . . . on the 21st July next, provided that your tenancy originally commenced on that day of

the month, or if otherwise then that you quit and deliver up possession of the premises at the expiration of the three months which shall expire next after the time of your being served with this notice." On the 22nd July a written notice was given by the lessor, demanding immediate possession.

J. H. Moss, for the tenant, contended that, as the proviso gave "the parties" the right to terminate the lease, such right existed only in the lessee (*Dann v. Spurrier*, 3 B. & P. 399, 403), and that the notice was a bald notice to quit, and could only have been given for the termination of the tenancy at the end of a year.

D. L. McCarthy, for the landlord.

MACMAHON, J.—If the proviso ended with the words giving "the parties" the right to terminate the lease, it would be ambiguous and would be construed in favour of the lessee; but it also provides that notice may be given "of his or her intention so to do," and so the notice may be given by either party.

The other point is directly covered by *Soames v. Nicholson*, 71 L. J. K. B. 24, where it was held that in the absence of any express provision in the agreement that a tenancy from year to year was entered into, a three months' notice might be given at any time to determine the agreement. See also *Foa on Landlord and Tenant*, 2nd ed., p. 485. And, therefore, having regard to the terms of the lease and the rights of the parties thereunder, no difficult questions of law were involved.

Motion dismissed with costs. Stay of writ of possession till 1st October to enable tenant to remove from the premises.

ANGLIN, K.C.

SEPTEMBER 12TH, 1902.

TRIAL.

MCLEAN v. ROBERTSON.

Public Schools—Change of School Site—Adoption by Trustees—Ratepayers' Meeting—Resolution—Minutes—Evidence dehors—Inspector—Arbitration—Award—Injunction—Estoppel—Res Judicata—Reverting to Former Site after Change—Resolution of Ratepayers—Poll—Qualification of Voters—Scrutiny.

Action tried by F. A. Anglin, K.C., sitting for FERGUSON, J., without a jury, at Gore Bay.

W. H. Williams, Gore Bay, for plaintiffs.

A. G. Murray, Gore Bay, for defendants.

ANGLIN, K.C. :—The plaintiffs, suing on behalf of themselves and all the other ratepayers of school section 2 of the township of Allan, in the district of Manitoulin, claim a declaration that the legal school site of the section is upon lot 18 in the 9th concession of Allan (known as the “new site”), and relief consequential upon such declaration. The defendants, who were two of the present trustees (sued in that capacity and personally as well) and the public school board of the section, maintained that the legal school site is upon lot 18 in the 7th concession, known as the “old site.”

At the annual meeting of ratepayers held in December, 1899, it was determined that a new school building should be erected. At a meeting of the trustees held on the 9th March, 1900, a resolution was passed selecting the “new site” as the school site for the section, and directing the secretary to call a ratepayers’ meeting for the 17th March to consider and vote upon the suitability of this site. A ratepayers’ meeting was accordingly held on the 17th March. The minutes of this meeting were as follows:—“March 17th, 1900. The following is the minutes of a special meeting of the ratepayers of school section No. 2 in the school house at the hour of 2 o’clock, for the purpose of voting on a site selected by the trustees for the erection of a new school house, said site belonging to W. H. Brett and situated on the south-west corner of lot 18, concession 9. Moved in amendment by Thos. Robertson, seconded by Thos. Wilson, that Neil McLean act as chairman. Lost. Original motion moved by Neil McLean, seconded by Herbert Gilroy, that Ben. Vine be chairman. Carried. Moved in amendment by Thos. Robertson, seconded by Thos. Wilson, that Jas. Wm. Kerr be secretary. Carried. Moved by Neil McLean, seconded by W. H. Brett, that a division of the house be taken on the question. Carried. Moved by Robert Brett, seconded by Neil McLean, that this meeting adjourn. Carried. Benjamin Vine, chairman. Jas. Wm. Kerr, secretary.”

It was contended for plaintiffs that the minutes were defective, and parol evidence was given, subject to objection, as to what actually took place at the meeting.

The great weight of the parol testimony, if admissible, was that a motion was made that the “new site” be chosen; that such motion was duly explained both by the mover and by the chairman, and was submitted to and carried by the meeting. The minutes were not read over to the meeting or in any way formally adopted by it as the record of its

transactions. In the absence of any statutory provision declaring the minutes to be the sole evidence competent to prove the transactions at ratepayers' meetings, parol evidence was admissible (*Miles v. Bough*, 3 Q. B. 845, 872); and the evidence given established the fact that a motion for the selection of the "new site" was carried.

Three of the dissentients prepared a complaint of the proceedings at this meeting to be sent to the inspector under sec. 14, sub-sec. 8, of the Public Schools Act. The evidence does not establish that this complaint reached the inspector within 20 days after the meeting, and the onus of shewing that it did is upon the defendants. The inspector, however, acted under the power conferred by sec. 83, sub-sec. 1, and called a special meeting of ratepayers for the 1st September, at which meeting the majority chose the "old site." The inspector assumed that the necessary conditions then existed to bring into operation sub-sec. 2 of sec. 13, providing for an arbitration. The ratepayers' meeting named one White as arbitrator. The trustees declined to appoint an arbitrator. The inspector and White entered upon an arbitration and published an alleged award in favour of the "old site," White stating that he agreed in all the conclusions arrived at, but declined to join in making an award. The meeting of 1st September was not within sec. 31, and the conditions upon which an arbitration could proceed never existed. Sub-section 2 of sec. 32 applies to an arbitration between trustees and a hostile majority of ratepayers. But here the statutory equivalent of a submission never existed, and to such an objection effect must be given at any time and under any circumstances. In *re Cartwright School Trustees*, 4 O. L. R. 272, followed. See, also, *McGugan v. School Board of Southwold*, 17 O. R. 428, 429.

While the inspector was taking the steps above detailed, the board of trustees purchased the "new site" and completed their building. They moved the school furniture into the structure in November, 1900. An attempt to restrain them by injunction had been made in April, but the action did not proceed after a motion for an interim injunction had been refused. The plaintiffs ineffectually sought to found an estoppel upon the dismissal of this motion and the subsequent abandonment of the suit.

At the annual meeting in December, 1900, the friends of the "old site" were in a majority and elected one of their party a trustee. The new board at their first meeting, held in the old school house, resolved to remove the school furniture back to this building, which they did. Three ratepayers then instituted proceedings for a mandamus and injunction

to compel the return of this furniture to the new building. A motion was made before the local Judge, and upon a consent to the motion being finally disposed of by him being given, he adjudged that the "new site" was the legal school site, and the first meeting of the trustees of 1901 illegal, and its resolutions void, because the meeting was held in contravention of the direction of sec. 16, sub-sec. 1, of R. S. O. ch. 292, that the first meeting of the trustees shall be held "at the school house of the section." The board of trustees was not a party to that proceeding. It did not appear that any writ of summons had issued. No order was drawn up or signed. None of the papers purporting to be filed upon the motion were stamped. The estoppel alleged by plaintiffs was therefore not established; and a subsequent proceeding against the secretary, taken before the District Judge as *persona designata* under sec. 109, also fell short of anything in the nature of an estoppel or *res judicata* against defendants.

The trustees acquiesced for the time in the view taken by the local Judge, and returned the furniture to the new building, where the school was carried on until the summer of 1901. In April, 1901, however, at a duly convened meeting of trustees, a resolution was passed that the "old site" be selected as the school site for the section, and that a meeting of ratepayers be held on the 20th April to consider such selection. This meeting was held, and the "old site" was adopted by a majority of seven. Before this, the statute of 1901, 1 Edw. VII. ch. 39, became law and is applicable. As to this meeting, (1) although the school site had been fixed by the action of the trustees and ratepayers in March, 1900, and a building erected on the site so fixed, it was competent for the ratepayers, a year later, to revert to the former site. *Wallace v. Township of Lobo*, 11 O. R. 648, applied. (2) In reverting to the old site there was no bad faith, nor was the doing so capricious, if the Court could be asked to review the action of the ratepayers upon such a ground. (3) There was no ambiguity in the resolution proposed to the meeting. The trustees acted prudently and in the best interests of the section in deferring the actual physical removal until the vacation. (4) It does not come within the scope of the action to declare, nor is there evidence upon which it can be declared, that the return to the old building is unreasonable and dangerous to the health and welfare of the pupils because of its bad condition. (5) Upon an investigation into the qualifications of the persons voting at the meeting, the resolution in favour of reverting to the old site was carried

by a majority of one out of all the duly qualified voters who voted. Quære, whether the vote is subject to scrutiny in this action; but if not, the same result follows upon a greater majority.

Action dismissed. Plaintiffs to pay defendants' costs of the action, including the costs of motions for and to continue an interlocutory injunction, and to pay defendants' costs of the counterclaim.

WINCHESTER, MASTER.

SEPTEMBER 12TH, 1902.

CHAMBERS.

REX EX REL. ROSS v. TAYLOR.

Municipal Election—Irregularities—Evidence of—Saving Clause.

An application to set aside the election of the respondent as reeve of Port Dover, because the election was not conducted according to law, in respect of the conduct of the returning officer, the voters' lists, etc. The relator alleged 15 grounds of complaint.

E. E. A. DuVernet and H. A. Tibbetts, Port Dover, for the relator.

S. C. Biggs, K.C., for the respondent and for the returning officer.

THE MASTER (after a careful examination of the evidence with regard to each ground of complaint) :—In my opinion, the irregularities complained of have not in any way interfered with the election of the respondent, which appears to have been regularly conducted. The only objections worthy of special reference are 5, 6, and 7, and the irregularities referred to come within the provisions of sec. 204 of the Municipal Act: *Woodward v. Sarsons*, L. R. 10 C. P. 733. I therefore refuse the application with costs to be paid by the relator to the respondent. There will be no costs to or against the returning officer.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING SEPTEMBER 20TH, 1902.)

VOL. I. TORONTO, SEPTEMBER 25, 1902. No. 31.

SPOONER v. MUTUAL RESERVE FUND LIFE
ASSOCIATION.

CORRECTION.

In the report of this case, ante pp. 566-7, it is stated as part of the judgment of ROBERTSON, J., that "the plaintiff is entitled to recover, but her dealings were not altogether fair in their character, and consequently she will have to pay costs."

This is incorrect.

The following extracts from the written opinion shew what the learned Judge really decided as to costs:—

"On the whole case, the plaintiff is entitled to recover, although I think her dealings with the Home Life were of a character not strictly fair, but that should only affect the question of costs, and I do not feel that I would be justified on that account to deprive her of them. . . . The defendants will pay all the costs of the action and of the reference, if any."

SEPTEMBER 15TH, 1902.

C. A.

MASON v. LINDSAY.

Appeal—Court of Appeal—Leave to Appeal—Important Question of Law—Construction of Statute—Small Amount in Controversy.

Motion by defendant for leave to appeal from order of a Divisional Court (ante 561), dismissing an appeal from the judgment of LOUNT, J., in favour of the plaintiffs in an action to recover possession of a piano. The principal question in the action was whether the plaintiffs were prevented from setting up their title to the piano as against defendant by reason of the Conditional Sales Act, R. S. O. ch. 149.

Joseph Montgomery, for defendant.

Strachan Johnston, for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.—The amount in question, i.e., of the defendant's interest in the piano, is small, less than \$100, and, although the point upon the construction of the Conditional Sales Act is an important one, and possibly still capable of argument, it does not seem reasonable that a further appeal should be permitted for the purpose of settling it at the possible expense of the plaintiff, who has already obtained the judgment of two Courts in his favour, although on different grounds. If the amount at stake had been more substantial, that might have been a reason for further argument, but, as the case stands, under all the circumstances, justice to both parties will best be done by holding that litigation is at an end. Motion refused with costs.

SEPTEMBER 17TH, 1902.

DIVISIONAL COURT.

MERCHANTS BANK OF CANADA v. SUSSEX.

Arrest—Ca. Sa.—Concurrent Writ—Expiry of Original Writ—Invalid Arrest—Application for New Writ—Concealment of Material Facts—Setting aside Order.

Appeal by defendant from order of FALCONBRIDGE, C.J., in Chambers, ante 572, dismissing defendant's motion to set aside an order made by the Chief Justice on the 21st May, 1902, under sec. 8 of R. S. O. ch. 8, for the issue of a writ of ca. sa. to the sheriff of Kent, and one or more concurrent writs, and another order made by the Chief Justice on the 21st August, 1902, for the issue of a writ of ca. sa. to the sheriff of Lambton, and also to set aside the writs issued pursuant to such orders, and for the discharge of the defendant from custody.

J. E. Jones, for defendant.

J. H. Moss, for plaintiffs.

The judgment of the Court (STREET and BRITTON, JJ.) was delivered by

STREET, J.—The concurrent writ of ca. sa. to the sheriff of Lambton issued on the 16th August, 1902, under which the defendant was arrested, was improperly issued, as it was issued more than two months after the original writ with which it was concurrent had been issued. The original writ had expired by lapse of time under Rule 874, and a concurrent writ could not thereafter be issued.

The defendant, besides appealing, moved the Divisional Court for his discharge from custody upon the merits and upon the ground of concealment by the plaintiffs of material facts in making the *ex parte* applications for the orders. The right to make such a motion is entirely founded upon Rule 1047, which is confined to the case of an order for arrest before judgment, and does not extend to a *ca. sa.*: *Kidd v. O'Connor*, 43 U. C. R. 193; *Bank of Montreal v. Campbell*, 2 U. C. L. J. N. S. 18; *Gossling v. McBride*, 17 O. R. 585.

As to the motion to set aside the order of 21st May, it was not pressed.

As to the motion to set aside the order of 21st August, upon the ground that plaintiffs, upon the application for it, suppressed and misrepresented facts which it was their duty to have fully and fairly disclosed, the following facts appeared. The plaintiffs' solicitor knew that defendant had been arrested on the evening of the 18th August under the expired concurrent writ by the sheriff of Lambton; he had had a conversation with the sheriff upon the subject over the telephone, and a further conversation with the sheriff's solicitor upon the same subject on the morning of the 19th August; the sheriff on the evening of the 18th August said he would free the defendant unless indemnified, and the plaintiffs' solicitor refused to indemnify him, but he abstained from stating that he supposed the defendant had been freed by the sheriff. With all these facts in his mind, he prepared an affidavit for the manager of the plaintiffs' office in Bothwell, and had it sworn by him on the 19th August, in which it was stated: "That in the month of May last I ascertained that the said defendant was in the neighborhood of Bothwell, in the county of Kent, but was keeping secreted, visiting relatives; that a *ca. sa.* for his apprehension was issued to the sheriff of Kent, but the defendant evaded arrest, and left for parts unknown to me; that within the last few days I ascertained that the said defendant is in the neighborhood of Sarnia, in the county of Lambton; that I have not the slightest doubt that the said defendant is about to, and will, unless he be forthwith apprehended, quit Ontario with intent to defraud the plaintiffs." The manager stated in a later affidavit that when he swore to this he was not aware that the defendant was under arrest, but believed he was still at large.

The solicitor who drew and procured the manager to swear to the affidavit above quoted, was guilty of an inexcusable breach of his duty to his clients and to the Court in concealing from them the true facts existing at the time the affidavit was sworn.

It was his duty to lay before the Court the material facts that the defendant had been arrested the evening before on an invalid writ; that he had been in illegal custody down to that day, at all events, at the suit of the plaintiffs, and that he might still be so. The Court would then have been in a position to deal with the application with the same knowledge as that possessed by the solicitor, and would probably have followed *Eggington's Case*, 2 E. & B. 717, in holding that defendant must first be absolutely discharged from his illegal custody before he could be arrested under new process at the suit of the same plaintiffs. The application should not be treated as an appeal upon new material from the discretion of the Chief Justice in making the order of the 21st August. The application is really one to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which have been obtained by the wilful concealment or perversion of material facts. A clear case has been made out for the exercise of that discretion; and therefore the order of the 21st August and the writ issued under it should be set aside, and the prisoner discharged, upon condition that no action be brought against the sheriff for the arrest or detention or for anything done under either of them.

Appeal allowed with costs here and below.

STREET, J.

SEPTEMBER 17TH. 1902.

CHAMBERS.

RE SHORE.

*Will—Construction — Legacies — Conditions — Defeasance—Payment
before Period Mentioned in Will.*

Application under Rule 938 by two children of the testator, legatees under his will, for an order declaring them entitled to immediate payment of their legacies and of their shares of the residuary estate.

A. Hoskin, K.C., for the applicants.

A. E. Hoskin, for the widow.

F. E. Hodgins, K.C., for the executors.

STREET, J.—The applicants are not entitled to what they ask, and the executors cannot properly pay the money to them, even with the consent of the widow and of the other children. By the terms of the will a legacy was given to each of the four sons of the testator of \$17,000, to be paid as follows: \$3,000 on attaining 21; \$6,000 on attaining 24;

and \$8,000 on attaining 27; and to each of the three daughters of the testator, \$7,000, to be paid as follows: \$1,500 on marriage or at 21; \$2,500 at 24; and the balance at 30. Each of the children was to be paid the interest upon the unpaid portion after attaining 21, and until payment of the principal. These bequests were followed by a provision that in case of the death of any son or daughter without issue surviving, so much of his or her legacy as was not already paid should form part of the residuary estate, but in case of there being lawful issue, such issue should take the parent's share. In my opinion, the bequests were all subject to this provision, and its effect was to prevent the children from taking vested indefeasible interests in the various instalments of their legacies until the time for payment fixed by the will arrives: *O'Mahoney v. Burdett*, L. R. 7 H. L. 393; *In re Schnadhorst*, [1902] 2 Ch. 234; *Saunders v. Vautier*, 4 Beav. 115; and *Wharton v. Masterman*, [1895] A. C. 186.

The bequests of the residuary estate are in a different position. The testator directed that his residuary estate was to be divided in 15 years from the date of his will amongst his children so that each son should receive \$9 for every \$3 each daughter should receive; those children who have then attained 27 to receive their shares at once upon the expiration of the 15 years; those who have not attained that age to receive interest only after attaining the age of 21 until they attain 27, and then to receive the principal. But this, as well as the gift of the legacies, was subject to a power given to the widow in certain events to direct the trustees to pay to any child only the income of any portion remaining unpaid of any legacy or bequest to each child, with a gift over in such case to the children of such child.

In my opinion, this provision renders the gifts to each child defeasible until they are actually payable according to the terms of the will. The applicants, not having attained the age at which the legacies and shares of the residue are payable, are not entitled to either.

Motion dismissed with costs.

SEPTEMBER 18TH, 1902.

C. A.

REX v. TREVANNE.

Criminal Law—Evidence—Deposition Taken at Preliminary Inquiry—Admissibility at Trial—Incomplete Cross-examination—Waiver.

Crown case reserved by the Judge of the County Court of Lambton. The prisoner was charged on the 25th Febru-

ary, 1902, before a magistrate with having committed an indecent assault upon a female. The preliminary inquiry was begun at the house of the girl's father, where she was residing. The prisoner was represented by counsel, but before the girl's cross-examination was concluded, it became necessary, owing to her illness, to adjourn the proceedings, and they were adjourned till the 27th February. In the meantime the magistrate consulted the County Crown Attorney with reference to the charge, and on hearing from him telegraphed to the prisoner's counsel that he had got the official's opinion, and the case would have to go to Sarnia, and asked counsel to telegraph in reply whether he would come up or not. Counsel, taking this as an intimation that the accused would be committed for trial, telephoned the magistrate that, if he intended to send the prisoner to Sarnia at any rate, there would be no use in his coming, and accordingly he did not appear on the subsequent proceedings. On the morning of the 27th the magistrate went out to where the girl was residing, and obtained her signature to her deposition as it had then been taken down, the prisoner not being present or represented, and in the afternoon resumed the inquiry at his own office in Alvinston. The accused was present, but not the witness whose examination had been interrupted at the first meeting. Prisoner was asked if he had anything to say. He replied "nothing," and on the evidence as already taken was committed for trial. At the trial it was proved that the girl was so ill as not to be able to travel, and her deposition taken and signed as above mentioned was tendered by the Crown and admitted in evidence, contrary to objection. The County Judge reported that he considered that the prisoner's counsel had waived his right to further cross-examination, and that in any case the certificate on the depositions governed. By sec. 687 of the Criminal Code it is enacted that "if upon the trial of an accused person such facts are proved upon oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person is . . . so ill as not to be able to travel . . . and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the Judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that

such deposition was not in fact signed by the Judge or person purporting to have signed the same."

W. J. Treemear, for prisoner.

Frank Ford, for the Crown.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

OSLER, J.A.—The cross-examination never was in fact completed. It had been interrupted at the most critical and important stage of it, and the witness and accused were never brought face to face together again. The magistrate most irregularly obtained the signature of the witness to her incomplete deposition, in the absence of the prisoner, and afterwards, on this incomplete deposition, the witness not being present, committed him for trial. It is impossible to say that the prisoner's counsel, not to say the prisoner himself, ever had a full opportunity of cross-examining the witness. There is no pretence for saying that he waived it. Even if the inquiry had closed on the first day, the deposition disclosed on its face that there had not been a full opportunity of cross-examining the witness, as the magistrate interfered with the counsel and prevented questions being asked which, however painful to all parties concerned, were entirely pertinent and necessary to elucidate the vital point of the defence. The deposition was, therefore, not properly received in evidence, and, as there was no other evidence on which the conviction could be supported, it must be set aside and the prisoner discharged.

WINCHESTER, MASTER.

SEPTEMBER 18TH, 1902.

CHAMBERS.

GLOBE PRINTING CO. v. SUTHERLAND.

Summary Judgment—Rule 603—Liability of Defendants—Finding of Fact on Correspondence, Affidavits, and Depositions.

Motion by plaintiffs for summary judgment under Rule 603 in an action to recover the amount of an advertising account. The defendants did not dispute the amount, but their liability. They were brokers, and the advertisements published by the plaintiffs were in connection with the floating of the Atlantic Pulp and Paper Company, upon whom, or upon the Poole Publishing Company, the liability was alleged to be. A statement of claim had (by mistake of a clerk or the plaintiffs' solicitors) been delivered by plaintiffs before

the motion was made, and the defendants had served a third party notice on the Atlantic Pulp and Paper Company.

F. E. Hodgins, K.C., for plaintiffs.

W. E. Raney, for defendants.

W. R. P. Parker, for third parties.

THE MASTER held, on the correspondence between plaintiffs and defendants and the affidavits filed and the depositions of deponents on cross-examination, that the defendants had made themselves responsible to plaintiffs for payment of the account, and ordered judgment for the amount claimed with costs, but not to include the costs occasioned by the delivery of the statement of claim. He also made an order setting aside the third party notice without costs to the defendants or the third parties.

WINCHESTER, MASTER.

SEPTEMBER 18TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Municipal Elections—Irregularities at Polls—Aldermen of City—Election by General Vote—Voters Voting more than Once—Affecting Result.

Application by relator to set aside the election of eleven persons as aldermen for the city of St. Thomas, at the general election held on the 6th January, 1902, upon the ground that the election was not conducted according to law.

On 6th February, 1900, the city council passed a by-law providing for the election of the council by general vote, instead of by wards. The first election pursuant to the statutes and this by-law took place in 1901, when, under the Municipal Amendment Act, 62 Vict. ch. 26, sec. 13, every elector was permitted to vote in each ward in which he had been rated for the necessary property qualification for councillors or aldermen. On the 15th April, 1901, the Act 1 Edw. VII. ch. 26, sec. 9, was passed, adding to sec. 158 of the Municipal Act the following section:—"158a. In towns and cities where the councillors or aldermen are elected by general vote, every elector shall be limited to one vote for the mayor and one vote for each councillor or alderman to be elected for the town or city, and shall vote at the polling place of the polling sub-division in which he is a resident, if qualified to vote therein; or when he is a non-resident or is not entitled to vote in the polling sub-division where he resides, then where he first votes, and there only. . . ."

As to the election now in question, more than 100 witnesses were examined on behalf of the relator in support of this application, the greater number being examined as to the number of times they voted for aldermen. It was shewn by these witnesses that there were at least 90 votes polled which should not have been polled, according to the Act of 1901.

J. M. McEvoy, London, for relator.

E. E. A. DuVernet and W. K. Cameron, St. Thomas, for respondents.

THE MASTER held that the evidence wholly failed to support the allegation that these votes were cast by the deliberate corrupt and wilful connivance and arrangement of the defendants; but, on the contrary, these votes were cast in the honest belief of the voters that they had the right to cast such votes, and without any instruction from any of the candidates to vote for them more than once. The casting of such ballots was wholly irregular, and they should not have been allowed by the deputy returning officers, if they were aware that the voters had already voted. *Rex ex rel. Tolmie v. Campbell*, 4 O. L. R. 25, referred to. Even if the 90 votes improperly polled were struck off, that would not necessarily interfere with the result of the election, owing to the large majorities of at least 10 of the candidates elected over the first unsuccessful candidate. The election of the successful candidates was not affected by the improper votes being counted, and in other respects there was no such irregularity in the carrying out of the election as to affect the result.

Motion refused with costs.

WINCHESTER, MASTER.

SEPTEMBER 19TH, 1902.

CHAMBERS.

SLATER SHOE CO v. WILKINSON.

Discovery—Production of Documents—Correspondence after Action Begun—Information for Defence—Privilege—Examination for Discovery—Undertaking to Produce Documents—Particulars.

Motion by plaintiffs for a better affidavit on production from defendant and for particulars. The action was for an injunction restraining defendant from advertising, selling, or exposing for sale boots or shoes as "Slater shoes," "Slater goods," or "The Slater shoe," or under any name or description of which the name "Slater" forms part, without clearly

distinguishing the boots or shoes so advertised, sold, or offered from those made or sold by plaintiffs.

M. H. Ludwig, for plaintiffs.

J. H. Moss, for defendant.

THE MASTER.—The defendant, upon being served with the writ of summons, communicated with George A. Slater, the vendor of the goods in question, with a view of obtaining information to aid him in the defence of this action, and certain letters and telegrams passed between them, which, on his examination for discovery, defendant refused to produce on the ground of privilege. In my opinion, under *Donahue v. Johnston*, 14 P. R. 476, and cases therein referred to, defendant is not bound to produce these documents.

As to the stock-book shewing stock in trade of defendant, as the defendant on his examination promised to "send it down," it should be produced. So also as to an account of one Richardson for printing hand bills.

As to the motion for particulars of the words "under the circumstances" in the 10th paragraph of the defence, I think the particulars of "the circumstances" are sufficiently set out in the preceding paragraph of the defence, and, besides, further particulars were given in the defendant's examination.

Order made for production of stock book and Richardson account for inspection. No further affidavit or examination necessary. Costs in cause.

STREET, J.

SEPTEMBER 19TH, 1902.

CHAMBERS.

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside.

An appeal by the defendants from the order of the Master in Chambers, ante 569.

W. M. Douglas, K.C., and A. McLean Macdonell, for appellants.

C. D. Scott, for plaintiffs.

STREET, J., at the conclusion of the argument, dismissed the appeal with costs, and affirmed the order of the Master.

MACMAHON, J.

SEPTEMBER 19TH, 1902.

TRIAL.

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Ship—Charterparty—Breach—Time—"Load," Meaning of—Measure of Damages.

Action to recover \$4,950 for alleged breach by defendants of an agreement to furnish the plaintiffs' steamer "Midland Queen" a cargo of grain to be carried from Fort William to Goderich. The defendants denied liability and counter-claimed for \$7,500 damages for alleged breach of agreement to carry the cargo between the two places.

The correspondence forming the contract was carried on by A. F. Read of Montreal, representing plaintiffs, and G. R. Crowe of Winnipeg, representing defendants.

November 22, 1901. Crowe wired Read "to load Midland Queen last trip at Fort William at 4½ cents to discharge at Georgian Bay or Goderich."

November 23. Read wired Crowe: "Playfair (plaintiffs' manager) confirms charter Queen Fort William to Goderich, loading about Dec. 2, weather, ice, permitting, 4½ cents bushel."

November 23. Crowe wired Read: "We confirm Midland Queen 4½ Goderich, load Fort William on or before noon 5th December."

The steamer reached Fort William on the 3rd December, and left at noon on the 5th December, without the cargo. The steamer was obliged to leave, because the insurance would have expired if the return voyage had not then commenced.

There was a dispute as to which party was in default.

C. Robinson, K.C., and F. E. Hodgins, K.C., for plaintiffs.

A. B. Aylesworth, K.C., and C. A. Moss, for defendants.

MACMAHON, J., found upon the evidence that the defendants were in default; that the loading of the cargo could have been commenced at seven o'clock on the evening of the 4th December and the whole or the greater part of the cargo

could have been put on board before eleven o'clock on the morning of the following day; and that the plaintiffs did all that could be done to carry out the terms of the charter.

He then proceeded to discuss the meaning of the words "load on or before noon 5th December," and referred to *Bowes v. Shand*, 2 App. Cas. 455. . . . He continued:

According to my reading of the contract in this case, the words in their natural sense have a definite meaning, which is, that the vessel was to be *completely* loaded by noon on the 5th December. "To ship" and "to load" are synonymous terms, and each means the completion of putting the cargo on board. See judgment of Lord Selborne in *Grant v. Coverdale*, 9 App. Cas. 475.

There was, however, evidence given on behalf of plaintiffs as to what is the meaning amongst shippers of "to load," that it means that the whole cargo is to be in the vessel at the time stated in the contract. Evidence was given on behalf of the defendants that the contract would be complied with if the charterer had commenced loading at the time named.

There is no provision in the contract for "lay days" and "demurrage days." Where a fixed time is provided in the contract for loading a vessel, it is the duty of the charterer to load within that time, whatever may be the nature of the impediments which prevent him from performing it: *Postlethwaite v. Freeland*, 5 App. Cas. 599; *Abbott on Shipping*, 5th ed., p. 180, 14th ed., pp. 394, 396; *Randall v. Lynch*, 2 Camp. 352; *Budgett v. Binnington*, [1891] 1 Q. B. 35; *Davies v. McVeagh*, 4 Ex. D. 265; *Tapscott v. Balfour*, L. R. 8 C. P. 46; *Pyman v. Dreyfus*, 24 Q. B. D. 152; *Scrutten on Charterparties*, 4th ed., p. 96; *Dahl v. Nelson*, 6 App. Cas. 38. . . .

The defendants are liable to the plaintiffs for not loading this cargo by the time named, and the measure of damages is the amount of freight which would have been earned after deducting the expenses of the vessel: *Smith v. McGuire*, 3 H. & N. 54. The vessel could have taken on board 102,000 bushels, which at 4½ cents per bushel would amount to \$4,590. There will be judgment for plaintiffs for this amount (less the expenses of the vessel from the time it left Fort William until it could have reached Goderich, which can be agreed upon between the parties), together with interest from the 15th December, 1901, and the costs of suit.

The defendants' counterclaim is dismissed with costs.

SEPTEMBER 19TH, 1902.

C. A.

NELSON COKE AND GAS CO. v. PELLATT.

Company—Subscription for Shares—Preference Shares—Validity of—Contract by Deed—Issue and Allotment—Necessity for—Calls—Resolutions and Letters—Sufficiency of.

An appeal by plaintiffs from judgment of LOUNT, J. (2 O. L. R. 390) dismissing action to recover amount alleged to be due by defendant in respect of shares in the plaintiff company subscribed for by defendant.

G. H. Watson, K.C., for plaintiffs.

H. J. Scott, K.C., and H. H. Macrae, for defendant.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A.—LISTER, J.A., having died since the hearing) was delivered by

MACLENNAN, J.A.:—Provision was made for preference shares in the memorandum and articles of association, sec. 5 of the memorandum and sec. 3 of the articles. . . . That these provisions are legal and valid features of the constitution of the company is clear: *Ashbury v. Riche*, L. R. 7 H. L. 653; *In re South Durham Brewery Co.*, 31 Ch. D. 261.

There is, therefore, no distinction between the two classes of shares in question, and if the defendant is liable upon the one class, he is equally liable on the other.

The company was incorporated under the Companies Act of British Columbia, R. S. B. C. ch. 44, on the 26th August, 1899, and the first document signed and sealed by the defendant is dated 1st September, 1899. The second document was also under seal, and bore date the same day and was contained in a stock subscription book. (Both are set out in the report in 2 O. L. R.) . . . The legal effect of both is the same. In both the appellant covenants with the company to become a shareholder, to take 200 shares of each class, when issued and allotted, and to pay for them at par when calls should be made.

The evidence shews that when the appellant executed the agreement he was in constant communication with Dr. Doolittle, a director of the company, and that they were associated together in obtaining subscriptions for shares on behalf of the company. The contract in question is, therefore, one entered into by the appellant with the company, at the request of one of its directors, acting for and on behalf of the company.

[Citations from *Hebb's Case*, L. R. 4 Eq. 11, and *Gunn's Case*, L. R. 3 Ch. 40.]

Treating this instrument, then, like an ordinary contract, what is its proper legal effect? The company was duly incorporated, and had \$250,000 of capital stock to dispose of, divided into shares of \$25 each, 3,000 shares being preference shares, and 7,000 common. One of the directors applies to the appellant to assist him in disposing of the shares. They find a number of purchasers, who agree to purchase shares, and who execute the deed of subscription prepared for the purpose. The appellant witnessed the first three signatures, and afterwards executed the deed himself, agreeing to take the shares now in question. . . . It is something more than an application or request. It has all the elements of a completed contract, and that by deed, and for valuable consideration. . . . There is no time limited within which the purchase is to be completed. It is not pretended that the deed was delivered in escrow, or was not intended to take effect immediately. It was delivered to the company through its agent. It is said that this deed was revocable, and that the appellant could have revoked it and withdrawn from it the next day or the next moment. I do not understand such to be the law. No doubt, a mere offer or proposal, either by parol or by mere writing, to take shares, is revocable before acceptance, like any other similar offer or proposal to buy or sell any other commodity: *Kelso's Case*, 4 Ch. D. 774. But it is otherwise when it is a contract by deed. [Citations from *Pollock on Contracts*, 6th ed., p. 48; *Anson on Contracts*, 9th ed., p. 34; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Doe Garçons v. Knight*, 5 B. & C. 692; *Moss v. Barton*, L. R. 1 Eq. 474; *Buckland v. Papillon*, L. R. 2 Ch. 62.] The present case is even stronger than *Xenos v. Wickham*, for this deed was prepared on behalf of the company and remained in its possession after execution.

Now, if this deed was binding upon the appellant, and irrevocable by him, as I think it was, it has never been repudiated by the company, but, on the contrary, the company has always treated it as valid and binding on both parties.

* * * * *

Numerous cases were cited laying it down that when an offer to take shares is made, it must be accepted by the company in a reasonable time, an allotment must be made, and notice communicated to the party, and that he may withdraw his offer at any time before allotment. That is undoubtedly so in the case of a mere offer not under seal. What we have

here, however, is a contract, and the substance of it is to purchase from the company the shares in question, and to pay for them at par when a call or calls are made. The purchase is of a definite number of shares, and not of so many as the company might allot, and, I take it, the appellant would not be bound to take any less number than 200 of each class. The covenant is to take them when issued and allotted. As applied to a fixed quantity of anything, or a fixed number of shares, the word "allot" can mean nothing more than to give, to assign, to set apart, to appropriate. The word has all these meanings. Nor does the word "issue" in the present case mean the doing of any particular act, and I think "issue" and "allot," taken together, mean no more than some signification by the company of its assent that the appellant now was or had become the owner of the number of shares which he agreed to take. [Citations from *Pellatt's Case*, L. R. 2 Ch. 527; *Bird's Case*, 4 De G. J. & S. 201; *Richards v. Home Assurance Co.*, L. R. 6 C. P. 591.]

The appellant's subscription was made in September, and on the 14th December the board passed a resolution that the subscribed for preferred stock of the company be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before 18th January, 1900. On the 26th December the treasurer wrote to the appellant that a call had been made for the whole amount of the stock subscribed, mentioning the number of shares and the amount due. . . . The resolution of the company and the letters of the treasurer, having regard to the appellant's contract, can have but one meaning, namely, that the company had appropriated to him 200 preference shares and had called for payment in full. I think it impossible to say that the resolution was not a most unequivocal act issuing and allotting to him those shares.

On the 13th March following the board passed a similar resolution with respect to the shares of common stock which had been subscribed for, and calling for payment in full on or before the 12th April, and thereupon on the 21st March letters in the same terms as the former were written to the appellant by the treasurer. I am of opinion that these resolutions and letters were a sufficient issue and allotment of the shares which the appellant had agreed to take, and that he thereupon became bound to accept and pay for them.

It was not until long afterwards that the appellant repudiated his subscription and his liability as a shareholder, namely, some time in November following. When, in November, he assumed to withdraw his offer, the company went

through the form of making an allotment of the shares to him, and the present action was commenced on the 9th January, 1901.

While I think the resolutions of 14th December and 13th March were a sufficient issue and allotment within the contract, if that were otherwise, the formal allotment in November was in time. I do not see how the appellant could get rid of the obligation of his deed by any mere notice of repudiation and withdrawal. . . . [Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 440, distinguished.]

Appeal allowed with costs.

SEPTEMBER 19TH. 1902.

C. A.

SMITH v. HUNT.

Mortgage — Pretended Sale under Power — Fraud — Purchasers for Value without Notice—Knowledge of Agent—Interest to Conceal—Redemption—Compensation.

An appeal by plaintiffs from judgment of MEREDITH, C.J. (2 O. L. R. 134) in so far as it was against the plaintiffs in an action to set aside certain assignments and conveyances and for redemption of mortgaged premises.

J. L. Murphy, Windsor, for appellants.

W. R. Riddell, K.C., and J. H. Rodd, Windsor, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The appellants contend that the value of the land was much greater than the sum at which it was fixed by the trial Judge, and that the defendants Hunt and Dresskell, as well as the defendant Roberts, should have been condemned to pay the loss the appellants have sustained by reason of the improvident sale.

I see no ground on which the defendant Dresskell can be said to have incurred any personal liability to the plaintiffs. He committed no wrong in taking an assignment of the plaintiffs' mortgage, and the sale made by him to Hunt, in the exercise of the power of sale, wrought no change in the plaintiffs' rights. Hunt became trustee for Roberts, and the property when in his hands was redeemable as before, unaffected by Dresskell's sale, and so remained until, at the request of Roberts, he conveyed to the club syndicate. It was that sale and that act which prejudiced the plaintiffs, and for that

reason I think Hunt is in a different position from Dresskell and in the same boat with Roberts. He was not a mere stranger to the property, and was more than a mere agent or quasi-trustee. He was possessed of the legal title, and had the legal power and control over it, which he was exercising, no doubt, at the instance of Roberts, the beneficial mortgagee; but I cannot see how this relieved him from the duty of selling in a provident manner, having regard to the interests of mortgagor and mortgagee. Moreover, it appears from the evidence of the defendant Hunt himself that he knew that these proceedings were being taken in order to enable Roberts to acquire the title to the property and so to sell to the syndicate. There was no idea or intention of selling it at the highest and best price obtainable so as to pay off the mortgage and procure something over it for the mortgagor. Lord Selborne's judgment in *Barnes v. Addy*, L. R. 9 Ch. 244, may be referred to.

I think the evidence does not warrant us in interfering with the learned trial Judge's finding as to the value of the property.

The 3rd and 4th paragraphs of the judgment below must be varied in accordance with this opinion. In other respects the judgment is affirmed without costs of appeal to either party.

SEPTEMBER 19TH, 1902.

C. A.

BURTON v. PLAYFAIR.

Specific Performance—Contract for Sale of Timber Limits—Correspondence—Completed Contract—Statute of Frauds—Misunderstanding—Title—Judgment—Reference.

An appeal by defendant from judgment of BOYD, C., directing specific performance of a contract by defendant to purchase from plaintiffs, for \$45,000, certain timber berths in the townships of Lount, Mills, and Pringle, in the district of Parry Sound.

A. B. Aylesworth, K.C., and W. Steers, Midland, for appellant.

W. Cassels, K.C., C. E. Hewson, K.C., and A. E. H. Creswicke, Barrie, for plaintiffs.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A.—The plaintiffs' right to a specific performance was contested on the grounds that there never was any concluded contract, or at all events no such contract evidenced by writing sufficient to bind the defendant within the provisions of the Statute of Frauds; that if there was any contract it was not with the defendant, but with the firm of Playfair & White; and that, in any case, there was such a mistake or misunderstanding with regard to the subject-matter of the contract as to justify the withholding of the relief of specific performance. It was also contended that plaintiffs were unable to make title to or convey the property to defendant.

The evidence of the contract between the parties, so far as it is required to be in writing, is contained in correspondence, and it was, of course, a necessary part of the plaintiffs' case that they should shew, not only that there had been a final agreement come to between them and the defendant, but that the terms of it were evidenced in a manner to satisfy the Statute of Frauds.

[The learned Judge then stated and commented upon the facts shewing the course of dealing leading to the contract, and set out the letters which passed between the parties.]

The defendant first wrote to the plaintiffs: "Re your berths in Mills, Pringle, and Lount. Mr. Benson made a very careful estimate of them, and he is three millions less than you claimed, and then the pine is scattered, and will cost quite a lot extra to lumber. . . . Some of the pine of a very nice quality. Taking everything into account, very best I can give for outfit would be \$45,000." The plaintiffs' answer was: "In reply to your letter of the 20th ult., in re the white pine timber on berths No. 4 Lount, No. 2 Mills, and 3 and 4 Pringle, and the spruce 12 inches and up in No. 4 Lount, district of Parry Sound, recently offered you and explored by your Mr. Benson, we hereby accept your offer of \$45,000 cash, subject to Crown timber regulations." The defendant received this letter on 4th October, and wrote plaintiffs as follows: "Yours of the 3rd duly received. Note you say the spruce 12 inches and up in Lount, whereas the agreement is for all timber in this berth. Kindly have this fixed."

The matter rested until the 8th October, when a conversation took place over the telephone, the upshot of which was

that plaintiffs' conceded all the timber in Lount, and both parties wrote on the same day. Plaintiffs' letter (exhibit 5) was: "Your letter of the 4th duly received. We are surprised to hear you claim that the agreement was to include all the timber in berth 4 in Lount. . . . To close the matter at once, we will let the other timber on this berth go in. You will, therefore, please advise what day this week you will pay the money and complete the transaction." Defendant's letter (exhibit 6) was: "Sorry we had the wee discussion over the 'phone, but from the start I understood that Lount went in just as you had it, but only the pine in Mills and Pringle. As arranged this a.m., you transfer your license of Lount—which takes in all the timber—and the pine on the other two. Will advise you when to send papers in a few days."

Defendant deposed as follows on examination for discovery: "I received the letter, exhibit 5, in reply to my letter of the 4th October. I asked him to kindly have it fixed about the spruce. He assented to everything, and put in exhibit 5 as regards the timber. I would think I had not received the letter of the 8th October (exhibit 5) when I wrote exhibit 6. Before writing 6 I had a conversation with Mr. Burton over the 'phone; it was with reference to the timber in Lount. He was trying to hold out the spruce under 12 inches and other timbers. I think he said over the telephone that he would let everything go. . . . After that conversation I wrote him the letter of 8th October (exhibit 6). That part of our conversation was reduced to writing by these two letters."

The defendant's own statement and the two letters establish a completed bargain and agreement between the parties, evidenced in writing under the hand of the defendant.

The next question is, a binding contract between the parties being established, has the defendant shewn any reason why he should not perform it?

The point suggested at the trial that the agreement was conditional upon the defendant being able to make satisfactory financial arrangements was not pressed in this Court, and is not sustainable on the evidence.

The contention that the contract was not with the defendant, but with Playfair & White, also fails. The defendant was dealing as a principal with the plaintiffs, and conducted all the correspondence in his own name, and as if the transaction was wholly on his own behalf, and the plaintiffs were dealing with and looking to him in the affair. White

was not recognized as a party by the plaintiffs, and was neither a party to the agreement nor to the writings evidencing it.

It cannot be found upon the evidence that there was any such mistake or misapprehension with regard to what was being purchased as should prevent specific performance. There were no representations as to the limits or the presence or absence of settlers made by the plaintiffs, and Benson was fully aware of the facts with regard to settlers, and set them forth in his report. There was also a reference to them during the discussion on the 2nd October, and the defendant then made no objection, but went on with the negotiations, and finally closed the bargain with full knowledge of the facts or with such knowledge as should have put him on further inquiry. He must be taken to have decided to accept the limits as they then were, if he could get them for \$45,000.

The objection to the plaintiffs' want of title is disposed of by the form of the judgment, which only compels the defendant to take the property in case a good title is made. It is not a valid objection to an action by a vendor that at the time of the contract he has not the legal estate or title to the property vested in him, provided he is in a position to procure it to be vested in the purchaser. And, as a general rule, questions of title are not disposed of at the trial of an action for specific performance, but are properly the subject of a reference. Furthermore, if the defendant desires the question of the plaintiffs' title to be dealt with at the trial, he must see that the defect or supposed defect is prominently put forward in the pleadings: *Lucas v. James*, 7 Ha. at p. 425. See also *Harris v. Robinson*, 21 S. C. R. at p. 400. Here the question of title was not raised by the statement of defence, and it was properly made the subject of a reference to the Master.

The judgment should be affirmed with costs.

SEPTEMBER 19TH, 1902.

C. A.

LEWIS v. DEMPSTER.

*Contract—Furnishing and Erecting Monument—Dispute as to Design
Selected—Performance of Work—Assignment of Contract—Action
by Assignees—Appeal—Reversal of Judgment on Questions of
Fact.*

Appeal by plaintiffs from judgment of BOYD, C., dismissing the action with costs.

The plaintiffs alleged that in March, 1900, the defendant gave to a firm of McIntyre & Gardiner an order in writing for a grave stone or monument of red Scotch granite of the kind known as "Hill o' Fair," to be delivered and set up in a cemetery, for \$1,500, and that the order was duly executed; that McIntyre & Gardiner duly assigned to plaintiffs all claim against defendant in respect of such order, and that the defendant was duly notified in writing of the assignment; and the plaintiffs sought to recover \$1,500, less \$54, the expense of putting in the foundation for the monument, which was paid by defendant.

There were several defences, but the main contest at the trial was in reference to one which was added at the trial, viz., that the monument erected by McIntyre & Gardiner was made and erected according to an entirely different design from the one selected by defendant.

The plaintiffs proved the execution of and put in an instrument in writing signed by McIntyre & Gardiner, by which they purported to assign to plaintiffs all their claim against defendant, amounting to \$1,446 and interest, for goods supplied under contract dated 8th March, 1900, or otherwise howsoever; and also proved notice thereof to defendant. They also proved the signature of defendant to two documents, the first of which was an order for red granite grave-stones "design No. E. M. Lewis Reporter Design," and the second an order for "one set of Hill o' Fair Scotch granite grave-stones."

The monument furnished and put up in defendant's plot in the cemetery was of "Hill o' Fair" red Scotch granite, substantially answering in appearance and design to the design produced by plaintiffs.

The defendant did not dispute his signature, but swore that the design specified in the first of the papers, viz., "E. M. Lewis Reporter Design," was not in the paper when he signed it, and that the design produced by plaintiffs as the one he selected was never shewn to or seen or selected by him, but, on the contrary, an entirely different design was shewn to and selected by him.

The Chancellor found upon the evidence, a great deal of which was contradictory, that credit was to be given to that of defendant; that the monument erected in the cemetery was not what defendant contracted for or expected to get; that it was different in colour and design; that defendant had had no opportunity of seeing the monument until he saw it for the first time in the cemetery, and that he then condemned it both as to colour and design—the pillars and

panels not being as ordered; that it had not been explained to defendant that the greater part of the granite would be so treated by the process of fine axing as to present a white or light appearance, and only the polished tablets be dark in colour; and therefore that defendant was not bound to accept or pay for the monument.

A. B. Aylesworth, K.C., and J. N. Fish, Orangeville, for appellants, plaintiffs.

T. Hislop, for defendant.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A., who, after setting out the facts and the evidence, and disposing in favour of plaintiffs of the question whether, assuming the monument to be of the design selected, it so corresponded in workmanship and detail with the design as to justify plaintiffs in maintaining that the contract had been so performed as to entitle them to be paid for it, proceeded as follows:—

The next objection is that the assignment to the plaintiffs does not entitle them to maintain this action in their own names.

It is said that the instrument is not an absolute assignment and that it is shewn that the plaintiffs are not the beneficial owners of the claim. But it purports to be an absolute assignment and does operate to pass the legal interest. It is not necessary for this purpose to use the word "assign" or any particular words, so long as the effect of the writing is to transfer the interest to the assignees. The intention was to transfer the interest so as to enable the assignees to sue. The fact that the fruits will be held by them in trust does not the less make it an absolute assignment under the Judicature Act, there being an assignment which purports to be absolute, and which the parties intended to be so: Warren, Choses in Action, 2nd ed., p. 164, and cases cited. The case of Mercantile Bank of London v. Evans, [1899] 2 Q. B. 613, on which reliance was placed, does not govern this case. There, as was pointed out by the Court of Appeal, the instrument did not purport to be an absolute assignment, and was probably only an assignment by way of charge. The case of Comfort v. Betts, [1891] 1 Q. B. 737, is in point, and shews that the assignment in question here is an absolute assignment within the Judicature Act. It is to be noted that when this point was under discussion at the trial, the learned

Chancellor expressed the opinion that there was nothing in it, and said that, if necessary, he would allow McIntyre (meaning no doubt McIntyre & Gardiner) to be made a party. There is no reason why the leave thus given should not be extended by this Court if the plaintiffs desire to avail themselves of it.

To return to the main issue of whether the monument is of the design selected and ordered by defendant. The first question to be determined is whether when the defendant signed the paper dated the 8th March, 1900, it contained the words "E. M. Lewis Reporter Design," which now appear written therein, in the handwriting of E. J. Ramsay, the foreman in McIntyre & Gardiner's shop. It was he who procured the order for the monument and handed it to McIntyre on the same day within three hours of the time it was signed. When McIntyre received it, it was in the same condition as it is now. The defendant's case is that the words in question were inserted after he signed it. It being undoubtedly signed by him, and it being produced in its present condition, the onus is on him to establish conclusively that it was altered after he attached his signature. His contention involves a charge of a very serious offence against Ramsay, and no motive is suggested. The learned Chancellor has made no express finding on this important question. . . . General statements ought not to be permitted to displace the weighty consideration that if the order of 8th March was in its present condition when the defendant signed it, he had then selected an E. M. Lewis Reporter Design, and that at the trial he utterly failed to shew any E. M. Lewis Reporter Design corresponding in the least degree with the design which he alleges he selected. . . . An attempt was made at the trial to raise an inference that the ink with which the words in question are written is not the same as the rest of the writing. An inspection of the paper does not lead to that conclusion. On the contrary, it leads to the conviction that all the writing was done at the same time. . . . The defendant deliberately charged Ramsay with forgery. The latter denies in the most emphatic way that he touched the paper with a pen or made any alteration after it was signed, and the circumstances, as well as the probabilities, are in his favour. . . . Upon the whole case, I think the defendant has failed to establish that when he signed the order of 8th March the words "E. M. Lewis Reporter Design" were not in it, and that the finding of fact ought to be that the order was in the condition it is now in when the defendant put his signature to it, and that the E. M. Lewis Reporter Design

therein mentioned is the design produced by the appellants and sworn to by Ramsay as the one selected by the defendant.

I have not overlooked the argument that to allow the appeal is to overrule the findings of the trial Judge upon conflicting testimony. I have already shewn that there are no specific findings upon the material questions in issue between the parties. But the rule invoked has no application save where there is a direct conflict of testimony on some material point, and there are no circumstances one way or the other. This was pointed out in *Morrison v. Robinson*, 19 Gr. 480, by the present Chief Justice of Canada, then Vice-Chancellor Strong, at p. 487. See, also, *Coghlan v. Cumberland*, [1898] 1 Ch. 704. In the present case there are circumstances which, in my judgment, are quite sufficient to outweigh the statements of the defendant and his witnesses where they are in conflict with the documents and the testimony of the appellants' witnesses.

I would allow the appeal.

SEPTEMBER 19TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Indemnity—Contract—Construction of Works for Municipal Corporation—Liability for Injuries to Persons—Provisions of Contract—Agreement with Another Contractor—Want of Privity—Costs of Defending Action—Third Party.

An appeal by one Crang, a third party, from the judgment of MACMAHON, J., at the trial, was heard at the same time as the defendants' appeal, the result of which is reported ante 440.

The plaintiff sued defendants for negligently allowing a certain street in their municipality to be out of repair by leaving an open or uncovered pit or excavation therein, into which one Levi Gaby, the plaintiff's husband, while lawfully using the street, fell, and thereby met with the injury which caused his death. The defendants brought the appellant, James Crang, into the action as a third party in the usual way, alleging that the disrepair of the street was occasioned by his negligence, and that they were by statute or by the terms of some contract between them entitled to be indemnified by him against any damages the plaintiff might recover in the action. The action against the city corporation and the claim against the third party were tried at the same

time before MACMAHON, J. The plaintiff obtained judgment against the corporation, and the appellant was held liable to indemnify the latter against plaintiff's judgment and costs. From the judgment in favour of plaintiff, defendants and third party appealed, contending that no actionable negligence had been proved against the corporation, and that the deceased had been guilty of contributory negligence. The third party also appealed generally from the judgment awarding indemnity to the defendants. The latter is the appeal now in question.

The appellant by deed contracted with defendants to perform all the excavation, filling, masonry, and brick work required in the erection and completion of the new St. Lawrence market in the city of Toronto. Excavations were made by the appellant, and into one of them, which had been negligently left uncovered, as found by the Court, the plaintiff's husband fell.

The appellant was required, by general condition 1 of his contract, to "properly protect his work during progress." By clause 13 it was provided that defendants should not in any manner be answerable for injury to any person or persons, either workmen or the public, "against all which injuries to persons or property the contractor will properly guard, and make good all damage which may arise or be occasioned by any cause connected with this contract or the work done by the contractor, and will indemnify and keep indemnified the corporation against the same until the completion of all the works." And by his bond the appellant was bound to indemnify the defendants against loss or damage by reason of the execution of the works.

An agreement was also made between one Macintosh and defendants for the performance of the carpenter and joiner work of the new market, by one of the general conditions of which it was provided that "the carpenter shall erect and maintain the hoarding of Front and West Market and Jarvis streets. . . . This hoarding shall be constructed according to the building by-laws and to the satisfaction of the architect." The architect, under the authority of another clause of the contract, thought proper to waive and dispense with the construction of the hoarding. Macintosh's contract was not referred to in or made a part of the appellant's contract, and there was no evidence that the appellant knew that he had agreed to erect a hoarding or that the defendants' architect had absolved them from doing so.

J. Bicknell, K.C., and J. W. Bain, for the appellant.

A. F. Lobb and W. C. Chisholm, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A., who, after setting out the facts, continued:—

Either or both of these provisions (clause 13 of the appellant's contract and his bond) *prima facie* warrant, in one form or another, a judgment for indemnification of the respondents, and that has hardly been contested. But the appellant urges that under the agreement with Macintosh a duty was cast upon the respondents to fence off or picket by a hoarding or other guard that part of the street within which his work was being done, and that it was owing to their neglect of this obligation that the locus in quo was left open to access by the deceased. . . .

Under the circumstances, it must, in my opinion, be held that the appellant is not in privity with Macintosh's contract. The two contracts are separate and distinct. His own contract is absolute, and by the terms of it he must abide.

I notice Mr. Bicknell's contention that his client should not have been ordered to pay the costs incurred by the city in defending the action. In doing this their course was not unreasonable; the appellant did not offer to assume the burden of the defence, and the appellant's liability under such circumstances may well be rested on his contract.

We can only dismiss the appeal.

SEPTEMBER 19TH, 1902.

C. A.

THORNE v. PARSONS.

Will—Construction—Gift—Intention to Include Choses in Action—Reference—Appeal from Report—Looking at Original Will—Costs.

An appeal by defendants H. Thorne, A. M. Thorne, and C. Thorne from an order of a Divisional Court reversing the finding of the Master in Ordinary upon a reference in an action involving the construction of the will of William Thorne.

The appeal was heard by MEREDITH, C.J., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.

D. O. Cameron and T. J. Blain, Brampton, for appellants.

S. H. Blake, K.C., for respondents J. M. Thorne and W. H. Parsons.

W. T. J. Lee, for respondent W. H. Thorne.

D. W. Saunders, for respondents P. M. A. Thorne and others.

Moss, J.A.:—The original judgment in this action contained, amongst other provisions, a reference to the Master in Ordinary to pass the accounts of the dealings of the executors and trustees named in the will of the testator, William Thorne, with the estate which came to their hands, and to fix their compensation.

In proceeding with the reference, the Master in Ordinary found that certain persons, including Horace Thorne, Anna Maria Thorne, and Catherine Thorne, should be enabled to attend the proceedings, and he therefore caused them to be served, and thereafter they were treated and named as parties defendants in accordance with the Con. Rules.

Horace Thorne, Anna Maria Thorne, and Catherine Thorne did thereafter attend the proceedings in the Master's office; and filed surcharges and objections to the accounts filed by the executors and trustees. Among other objections, they sought to surcharge the executors and trustees with the amount of certain moneys said to have been received on account of an indebtedness owing to the testator by the partnership firm of W. H. & B. J. Thorne, which consisted of William Henry Thorne and Benjamin J. Thorne, who at the time of the making of the will and of the testator's death were carrying on business at Holland Landing as tanners and otherwise, on premises owned by the testator.

The surcharging parties are the persons now entitled to certain annuities, the payment of which was charged upon that part of the property of the testator at Holland Landing which passed under the will to William Henry Thorne; and the contention of the surcharging parties before the Master was that the indebtedness of the firm of W. H. & B. J. Thorne was part of the testator's property which did pass to W. H. Thorne. Their contention was upheld by the Master, but, upon appeal to a Divisional Court by the plaintiff John Muls Thorne and the defendants adverse in interest to the surcharging parties, the Master's ruling was reversed.

From this judgment the surcharging parties appealed to this Court. The plaintiff W. H. Thorne, who did not join in the appeal to the Divisional Court, and was therefore made a respondent, and was included with the other respondents in the order of the Divisional Court for payment of the costs of that appeal, appeared on the argument of the appeal to this Court, and complained that he was improperly charged with such costs.

Upon the main question I see no reason to differ from the Divisional Court. The words of gift to W. H. Thorne are: "My mill, tannery, houses, lands, and all my real estate and property whatsoever and of what nature or kind soever at Holland Landing." Undoubtedly these words, if left to their ordinary signification, are wide enough to include personal property and effects, and even a debt owing to the testator in respect of property owned by him at Holland Landing.

The question in a case of this kind is, whether it was the intention of the testator to include book debts in the gift, and this must be discovered by reading the whole will.

[Reference to *Horsefield v. Ashton*, 2 Jur. N. S. at p. 195; *In re Prater*, *Designe v. Beare*, 37 Ch. D. at p. 486; *Earl Tyrone v. Marquis of Waterford*, 1 De G. F. & J. at p. 631.]

But in the will before us there is much in the context to control the ordinarily extensive signification of the words employed in the gift to W. H. Thorne, and to shew that it was not the testator's intention to give him more than the real property and property savouring of realty. Much stress has been laid on the many general words following the descriptive words in the devise, and it was argued that the doctrine of *ejusdem generis* is not to be applied. But the cases shew that where there is found the intention to deal with property referred to as being in a particular locality, the necessity is no longer felt of giving effect to all those general words which follow the enumeration of the particulars. This was pronounced by Kekewich, J., in *Northey v. Paxton*, 60 L. T. at p. 31, to be the real principle, and to be equally applicable whether the enumeration is slender or otherwise, provided, of course, that the context and the circumstances generally allow of the application.

The provisions which follow the words of gift to W. H. Thorne contain more than one reference to the testator's property at Holland Landing, which might be considered as equally applicable whether the testator intended both real and personal property, or only the former, to be included. But, as pointed out by Street, J., the clause which he has termed the 3rd paragraph of the will, makes a distinct separation between the two kinds of property, and plainly indicates that the personal estate, money and securities for money, were not given to W. H. Thorne. In that paragraph the testator was making a provision for an annuity to his wife to be

charged upon his general estate, except his property at Holland Landing. And if he intended or supposed that it had been all given to W. H. Thorne by what Street, J., terms the 2nd paragraph of the will, it would have been sufficient for him to have said: "But I hereby except my said property at Holland Landing aforesaid from the payment of any portion of such last mentioned annuity to my said wife:" and stopped there. But he proceeds, "as well as my personal estate, money and securities for money, also at Holland Landing aforesaid." This makes it plain that by the words "my said property at Holland Landing aforesaid," he did not intend to include his personal estate, money and securities for money, at Holland Landing.

Referring again to what has been termed the 2nd paragraph, it is manifest that the testator intended to charge the property he was giving to W. H. Thorne, with the payment of certain annuities and legacies. He says, "I hereby charge the said Holland Landing property," that is, the Holland Landing property he had just given to W. H. Thorne. Then in the exception in what has been termed the 3rd paragraph, he uses not quite but substantially the same expression, viz., "my said property at Holland Landing aforesaid," and so again indicates the property he had given to W. H. Thorne. Then follow the words already quoted which interpret the foregoing words as not including the personal estate, money and securities for money, at Holland Landing. And this construction leads to the exclusion of any claim of W. H. Thorne to the book debts in question.

I have arrived at this conclusion without reference to the appearance of the original will. If we are at liberty to look at it for the purposes of construction—as to which see *Child v. Ellsworth*, 2 DeG. M. & G. 683; *Manning v. Purcell*, 7 DeG. M. & G. 55; *Gauntlett v. Carter*, 17 Beav. 590; *Turner v. Hellard*, 30 Ch. D. 390—an inspection of what has been termed the 2nd paragraph lends support to the view that the testator's intention was not to include in the gift to W. H. Thorne the personal estate, moneys and securities for money, at Holland Landing.

As to the order for costs against the plaintiff W. H. Thorne, counsel appeared for him before the Divisional Court and was heard in opposition to the appeal. He appears not to have contented himself with submitting his rights as a trustee, but to have actively intervened as a contestant. He seems to have made common cause with the other respon-

dents, and for this reason was included with them in the order for costs.

The appeal should be dismissed.

MACLENNAN, J.A., wrote an opinion concurring.

MEREDITH, C.J., and OSLER, J.A., also concurred.

LISTER, J.A., died while the case was sub judice.

SEPTEMBER 19TH, 1902.

C. A.

ARMSTRONG v. CANADA ATLANTIC R. W. CO.

Master and Servant—Injury to Servant—Death—Workmen's Compensation Act—Notice of Injury—Excuse for Want of—Evidence—Statement of Deceased—Negligence—Cause of Injury—Jury.

An appeal by defendants from the order of a Divisional Court (2 O. L. R. 219) setting aside nonsuit entered by MACMAHON, J., in an action by the widow and infant child of Charles Armstrong to recover damages for his death alleged to have been caused by the defendants' negligence, and directing a new trial.

F. H. Chrysler, K.C., for appellants.

A. E. Fripp, Ottawa, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

OSLER, J.A., who, after stating the facts, continued:—The first question raised is as to the failure of the plaintiffs to give the notice required by sec. 9 of the Workmen's Compensation for Injuries Act, R. S. O. ch. 160. It is contended by counsel for the defendants that the finding of the learned trial Judge that no notice that the injury had been sustained was given within twelve weeks from the occurrence of the accident causing the death of the deceased, as required by sec. 9, and that no reasonable excuse for the want of such notice was offered or proved, being findings of fact, should not have been interfered with by the Court. That section is in these words: "Subject to the provisions of sections 13 and 14, an action for the recovery, under this Act, of compensation for an injury shall not be maintainable against

the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of injury; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice." Then sec. 13 (5) enacts as follows: "The want or insufficiency of the notice required by this section, or by sec. 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury if the Court or Judge before whom such action is tried, or, in case of appeal, if the Court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

Section 14 goes still further, enacting that if the defendant "intends to rely for a defence on the want of notice or the insufficiency of notice . . . he shall, not less than seven days before the hearing of the action, or such other time as may be fixed by rules regulating the practice . . . give notice to the plaintiff of his intention to rely on that defence, and the Court may, in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an adjournment of the case for the purpose of enabling such notice to be given; and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with secs. 9 and 13 of this Act."

The object of the notice is to protect the employer against stale or manufactured or imaginary claims and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses which bear upon the subject are very loosely fitted together, but the stringency of the original provision has been much relaxed, and the injured workman is evidently the first object of the Legislature's care: cf. R. S. O. 1887 ch. 141, secs. 7, 10 (5); 52 Vict. ch. 23, secs. 12, 13; and 55 Vict. ch. 30, secs. 9, 13 (5), 14, which is now found as R. S. O. 1897 ch. 160.

In order to justify the exercise of the power to dispense with the notice of injury, etc., prescribed by sec. 9, it should

appear (1) that there was some reasonable excuse for not having given notice; and (2) that the want of it has not prejudiced the defendants in their defence.

What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case.

The notoriety of the accident is one element, and the employer's knowledge of it and that the workman or his representative is in fact making a claim upon him in respect of it, is another. Both these circumstances concur in the present case, and there is the additional fact that the employers took the claim into consideration, but never gave the plaintiff a final answer.

Altogether, I think it might very properly have been held at the trial that there was reasonable excuse for the want of notice, and also, as the defendants had all the knowledge of the accident and claim that the most formal notice could have given them, that the want of it had not prejudiced them in their defence. I therefore agree with the judgment of the Divisional Court on this point. I cannot but think that reasonable excuse for want of notice may be very slight indeed, where the occurrence of the accident appears to have been well known to the employer, and a bona fide claim for compensation therefor has been made, inasmuch as the Judge has power under sec. 14, in the alternative, and simply in his discretion, and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given.

But, though the plaintiff has surmounted this initial difficulty in her case, there remains the question whether there was any reasonable evidence for the jury that the death of the deceased was caused by the negligence of the defendants, and on that point I feel myself compelled to take a different view from that which prevailed in the Court below.

It was conceded that the space between the tracks Nos. 4 and 5 was a "way" within the meaning of the Workmen's Compensation Act, sec. 3 (1), intended for or to be used in the business of the employers, and the sole ground of negligence relied on was that its condition was defective by reason of snow and ice having been allowed to accumulate thereon so as to render it unsafe and difficult to walk upon. If the deceased was using that way, and walking between the tracks and slipped from them into track No. 5, and was then run over by the cars, it is hardly denied that there was evidence for the jury of the defective condition of the

way. If, on the other hand, he was walking along No. 5 track when he was struck, the case falls to the ground, as there is no evidence of negligence in the condition of the track or the management of the engine. If deceased had reached the space between tracks 4 and 5, he must have done so by crossing in front of the cars, which had just been or were just being shunted into the latter after he had set the switch; in other words, he must have passed to that place from the switch on the other side of that track. He is found just behind the front wheels of the truck of the second car, the first car having been entirely derailed. No other cause for this circumstance is suggested, except that the car had passed over the deceased, and it appears to me equally consistent with all the facts in evidence that he was struck while just crossing the track in front of that car, as that he was walking along the space between the tracks and slipped into the track and under the first or second car. If the first car had not been derailed, there would be little or no room for doubt that deceased was walking between the tracks, but that fact removes the vital question, whether he was walking along the track or between the tracks, into the region of conjecture. The position in which deceased's body was found cannot assist us, as the learned trial Judge observed, for the sudden collision with the car might have thrown it into any imaginable position. The Court below has assumed that the place where he slipped was between the tracks. This, however, assumes the very question in issue. Upon that theory a new trial would be right, because, as I have said, there was evidence that the place was in a slippery and dangerous condition. It would in that case be quite unnecessary to lay stress on the deceased's answer to the question as to how the accident happened. That was an answer to a question put some minutes after the happening of the accident, and, even if it was properly admitted as being part of the *res gestæ*, I do not see how it aids the plaintiff in proving where deceased was when he was struck. It is quite as consistent with one theory as with the other. He may have slipped on the track or between the tracks, but unless it points to the latter it carries the case no further.

The learned trial Judge's opinion evidently was that there was no case for the jury. And as that, after a careful examination of the evidence, is my own view, I think that the appeal should be allowed.

SEPTEMBER 19TH, 1902

C. A.

BEAM v. BEATTY.

BUNTING v. BEATTY.

Infant—Bond with Penalty—Void or Voidable.

Appeal by defendant from judgment of FERGUSON, J. (3 O. L. R. 345, ante 54) in favour of the respective plaintiffs for damages upon bonds given by defendant in connection with the sale of stock in a company, the defence being that the defendant was an infant at the time of making the bond, which was therefore not enforceable and incapable of ratification.

C. A. Masten and F. C. McBurney, Niagara Falls, for appellant.

G. Lynch-Staunton, K.C., and A. W. Marquis, St. Catharines, for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

GARROW, J.A.:—There are two points, both questions of law, namely, (1) whether a bond with a penalty given by an infant is void or only voidable, and (2), if voidable, is there evidence of ratification?

Mr. Masten, counsel for the appellant, in an able and exhaustive argument, referred us to a number of authorities to establish his main proposition, that such a bond is wholly void, and therefore incapable of ratification, and, after an examination of these and of such other cases as I could find, my opinion is that his contention is well founded.

The opposing view is based very largely, apparently, upon some expressions to be found in Pollock on Contracts, 5th ed., p. 59, quoted by FERGUSON, J. This opinion is apparently also approved by another learned author—Anson on Contracts, 9th ed., p. 113.

On the other hand it is stated as the law in Addison on Contracts, 9th ed., p. 379, that "no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty." While Leake on Contracts,

3rd ed., p. 466, says that such an obligation "is absolutely void."

No authority is cited by either Pollock or Anson for their proposition, and it is somewhat remarkable that the exact point has not, apparently, been before determined. It has, however, in my opinion, been so approached and surrounded, so to speak, by what I must regard as high authority, that I feel myself unable to adopt the opinions of these learned authors. . . .

[Reference to and quotations from *Keane v. Boycot* (1785), 2 H. Bl. 511; *Baylis v. Dineley*, 3 M. & S. 477; *Cerpe v. Overton*, 10 Bing. 252; *Leslie v. Fitzpatrick*, 3 Q. B. D. 232; *Meakin v. Morris*, 12 Q. B. D. 352; *Corn v. Matthews*, [1893] 1 Q. B. 310; *Viditz v. O'Hagan*, [1900] 2 Ch. at p. 97.]

So that in these quotations, extending over a period of 115 years, we have a constant, and I think clear, expression of judicial opinion in favour of the proposition that the bond with a penalty of an infant is not merely voidable, but absolutely void, while not a single authority in the shape of a decided case can be found to the contrary. Lord Coleridge, in the case of *Meakin v. Morris*, speaks of it as a well settled rule, and Lush, J., in the earlier case of *Leslie v. Fitzpatrick*, uses similar language, while Lindley, M.R., as recently as the year 1900, in the case of *Viditz v. O'Hagan*, uses language equally explicit, although somewhat differently expressed.

The rule itself may perhaps be expressed thus, that, generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty, and again, another class of exceptions in which the contract is neither voidable nor void, but valid and binding on the infant, such as simple contracts respecting necessities. The exception before stated in the case of a bond with a penalty may not be logical, but the question is, is it the law of the land, and, after giving the matter most careful consideration, I am clearly of opinion that it is.

Having reached this conclusion, I have not considered it necessary to discuss the question of ratification.

I, therefore, think the appeals should be allowed and the actions dismissed, but, under the circumstances, without costs, and there should be no costs of the appeals.

SEPTEMBER 19TH, 1902.

C. A.

PROVIDENT CHEMICAL WORKS v. CANADA CHEMICAL MFG. CO.

Trade Mark—Descriptive Letters—Registration—Secondary Meaning—Proof of Acquisition of—Fraud—Deception—Infringement—Delay and Acquiescence—Injunction—Damages—Inquiry.

Appeal by plaintiffs from judgment of MEREDITH, C.J. (2 O. L. R. 182), dismissing action for an injunction and damages and other relief in respect of the alleged infringement by defendants of a trade mark registered by plaintiffs.

F. P. Betts, London, and H. Cronyn, London, for appellants.

G. F. Shepley, K.C., and E. W. M. Flock, London, for defendants.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MOSS, J.J.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A.—“The appellants’ first contention is, that the Chief Justice erroneously held that it was open to defendants to impeach the plaintiffs’ title as registered proprietors of the trade mark; that *Partlo v. Todd*, 12 O. R. 175, 14 A. R. 444, 17 S. C. R. 196, no longer governs owing to subsequent legislation; that defendants are not now entitled to attack, by way of defence, the plaintiffs’ right to register or put forward as a trade mark the letters in question; that the effect of 54 & 55 Vict. ch. 26, sec. 4, and 54 & 55 Vict. ch. 35, sec. 1, amending R. S. C. ch. 63, is to vest in the Exchequer Court of Canada the sole jurisdiction to adjudicate upon the validity of a trade mark, and so the Provincial Courts have no longer jurisdiction to entertain, in an action for infringement of a registered trade mark, a defence to the effect that plaintiff is not the proprietor of the trade mark, or that it is not one capable of registration.

[Discussion of the case and statutes just cited.]

The provisions of these two Acts, while extending the jurisdiction of the Exchequer Court so as to enable it to deal with doubtful or conflicting applications for registration, and with suits or applications to make, expunge, vary, or rectify

entries on the register, and even to entertain actions for injunctions or damages for infringement, do not extend or enlarge, or assume to extend or enlarge, the effect of registration or the certificate thereof. The certificate is still only *prima facie* evidence of the facts stated therein, and there is nothing in the legislation depriving a defendant of the right to shew that the facts were not truly stated, and that in truth there were no good or valid grounds for registering the alleged trade mark. This may lead to the somewhat anomalous result that a Provincial Court, in an action for infringement, may decide as to the validity of a trade mark in one way, while the Exchequer Court, on an application to expunge or rectify the register, may decide the contrary. But if the proprietor chooses to invoke the aid of the Provincial Court, instead of resorting, as he may do in the first instance, to the Exchequer Court, the defendant is entitled to the judgment of the tribunal upon the question of the plaintiff's title if he desires to raise it. The Exchequer Court is not expressly given exclusive original jurisdiction in regard to the classes of cases enumerated in sec. 4, but by sec. 5 it is given exclusive jurisdiction in cases of claims to public lands. I think, therefore, that it was open to the defendants in this case to impeach the plaintiffs' right to the trade mark which they put forward as the foundation of the action.

But, with much deference, I am unable to agree with the learned Chief Justice's conclusion against the trade mark. I agree that under our law, as under the English law, a merely descriptive word or name, that is, a word or name which merely denotes the goods or articles, or some quality attributed to them, is not capable of acquisition or proprietorship as a trade mark. But I fail to see how the three letters claimed by plaintiffs fall within this category. By themselves they do not describe any kind or quality of goods or articles. And they could only acquire any significance in the trade or upon the market by being so applied or attached to goods for sale in the market, as to distinguish them from similar goods, and to identify them with a particular manufacturer or trader, as made, produced, or sold by him: *Kerly on Trade Marks*, 2nd ed., p. 24. And if these letters have been shewn to fall within the definition, they were capable of registration as a trade mark under sec. 2 of R. S. C. ch. 63. The words of this section are much more general than the definition of trade mark under the Imperial Acts; and the decisions of the English Courts since 1875, except in respect of cases falling within the provisions of sec. 64 (3), (11),

of the Imp. Act 46 & 47 Vict. ch. 57, as amended by 51 & 52 Vict. ch. 50, are not to be too readily accepted as authorities. I think it is shewn that the letters in question were applied by the plaintiffs to a special kind of acid phosphate produced by them as early as the year 1884 or 1885; that they have ever since been used by the plaintiffs in connection with the same kind of acid phosphate; that acid phosphate has been ordered of and supplied by them under the designation "C.A.P.," and has become known by reference to these letters as the plaintiffs' product, and the letters "C.A.P." have become identified with the plaintiffs' acid phosphate. As early as 1886 they were deemed entitled to be registered as a trade mark in the United States; and since 1890 or 1891, at least, the plaintiffs' acid phosphate has been ordered and sold extensively in Canada by reference to these letters; and the plaintiffs' product has been distinguished from others by reference to these letters among traders and others dealing in acid phosphate as an ingredient for use in making baking powder. . . .

In my opinion, therefore, the plaintiffs had a good trade mark which they validly registered on the 24th July, 1900.

The defendants have used, and are using, the letters "C. A. P." in connection with the sale of acid phosphate made by them. Before the year 1897 they had made and sold acid phosphate, but had designated it acid phosphate of calcium or calcium acid phosphate. But in 1897 they began to use the letters "C. A. P.," and to connect them in such a way in the sale of acid phosphate as to be, in fact, a copy of the plaintiffs' trade mark. . . . The defendants deny intention to copy or imitate the plaintiffs' mark, and argue that no person has been deceived. But where the plaintiffs shew an actual copying of their registered trade mark, they are not required to go further. The act gives them the exclusive right to use the trade mark to designate the article manufactured or sold by them; and the defendants cannot, either knowingly or innocently, infringe upon that right. Under the English Act the same rule prevails: *Edwards v. Dennis*, 30 Ch. D. at p. 171; *Lambert v. Goodbody*, 18 Times L. R. 394.

It was objected that the plaintiffs were guilty of delay, or that they acquiesced in the defendants' use of the letters. But it is shewn that they only became aware of the defendants' user of them in the early part of 1900, when they immediately wrote protesting and requesting a discontinuance. This was followed by interviews between the solicitors and

parties, and further correspondence, during which the defendants asked the plaintiffs for delay. On the 5th October, 1900, the defendants' solicitors wrote that their clients declined to abandon the use of the letters "C. A. P.," and claimed that they had a right to use them, notwithstanding the plaintiffs' registration of their mark; and on the 25th October, 1900, this action commenced. The plaintiffs seem to have actively asserted their rights from the time they became aware that they were being infringed. It could not be pretended that there was such delay or acquiescence as to deprive the plaintiffs of their rights. In any case, it could only bear on the question of the nature and extent of the relief to be given. But I think there is nothing in this case to deprive the plaintiffs of their right to the usual judgment for an injunction. Ordinarily they would also be entitled to an inquiry as to damages or profits, at their election. But, inasmuch as it does appear from the evidence that no purchaser has been misled into buying the defendants' product instead of the plaintiffs', I think we may adopt the course taken by Romer, J., in *Hodgson v. Kynoch*, 15 R. P. C. 465, and restrict the plaintiffs to an inquiry as to damages, if they insist upon more than nominal damages, reserving the costs of the inquiry.

The appeal should be allowed with costs.

SEPTEMBER 19TH, 1902.

C. A.

STEVENS v. DALY.

Chattel Mortgage—Possession of Goods till Default—Absence of Redemption Clause—Seizure without Default—Collateral Security—Covenant to Keep up Stock in Trade to Value of Amount Secured—Arrears—Unpaid Interest—Issue of Writ of Summons—Condition against Selling—Damages.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for \$200 damages and costs in an action for maliciously and without reasonable and probable cause issuing a writ of summons against plaintiff, and falsely and maliciously and without reasonable and probable cause seizing and taking the plaintiff's goods under a chattel mortgage. The chattel mortgage was collateral to a land mortgage made by plaintiff to defendant, and the writ was indorsed with a claim to recover the moneys secured by the land mortgage.

The appeal was heard by ARMOUR, C.J.O., OSLER, MOSS, LISTER, J.J.A.

W. R. Riddell, K.C., and T. B. German, Napanee, for appellant.

A. B. Aylesworth, K.C., and G. F. Ruttan, Napanee, for plaintiff.

Moss, J.A.:—The defendant seeks to justify the entry upon the plaintiff's premises and the seizure of his goods upon several grounds, but, in my opinion, none of them is tenable.

First, he relies upon the terms of the chattel mortgage from the plaintiff to him as entitling him to take immediate possession without default, there being no re-demise clause. The chattel mortgage does contain, however, a provision enabling the mortgagee to take possession and sell under certain specified circumstances, and this provision is in terms almost identical with that contained in the chattel mortgage in question in *Dedrick v. Ashdown*, 15 S. C. R. 227. Furthermore, it was given as collateral security to a mortgage upon real estate from the plaintiff to the defendant, securing an advance from the latter of \$2,500, payable in instalments extending over a number of years, and it is expressed on its face that it is given as collateral. The nature of the goods and chattels mortgaged and the purposes for which they were employed by the plaintiff also lead to the conclusion that the intention of the parties was that the mortgagor was to retain possession until default. And upon the principles affirmed by the majority of the Supreme Court of Canada in *Dedrick v. Ashdown* (*supra*), wherein the views expressed in *Bingham v. Bettinson*, 30 C. P. 438, were affirmed, and the decisions in the earlier cases were not approved, it is proper to hold in this case that there was by implication a right in the plaintiff to retain possession of the mortgaged goods until default.

Secondly, the defendant relies upon the clause in the chattel mortgage requiring the plaintiff to keep up the amount of the "stock in trade" in the premises so that at no time shall it be of less than the actual cash value of \$2,500. It is difficult to make this covenant fit the condition of things existing when the chattel mortgage was executed. The goods and chattels mortgaged do not partake at all of the character of what is usually known and understood as stock in trade. It is to be observed that the mort-

gage is in a printed form, and this provision, which is not applicable to the circumstances, was allowed to stand. But, if it is to be applied to the goods and chattels embraced in the mortgage, it should be applied in the view which the parties evidently contemplated, viz., that for the purposes of the mortgage the goods and chattels should be treated as of the cash value of \$2,500. The evidence shews that they were kept up to the condition and value they possessed at the time of the execution of the mortgage, and there was therefore no breach of this covenant or term of the mortgage.

Thirdly, the defendant relies upon the provision enabling him to take possession upon the interest payable by the plaintiff upon any of his real estate mortgages becoming in arrear, and asserts that, although at the time he entered into possession and seized the goods there was as a matter of fact no interest unpaid upon any of the plaintiff's real estate mortgages, yet the payments were made after the dates on which they fell due, and therefore the interest had become in arrear. But this is not the meaning of the covenant. Its purpose was to protect the defendant against demands by mortgagees holding mortgages prior to his on the plaintiff's real estate in respect of unpaid interest, and "arrear" means unpaid arrears. The defendant had in his hands the receipts for all interest due on the real estate mortgages when he took his proceedings.

Fourthly, the defendant relies upon a provision of the chattel mortgage enabling him to take possession upon the issue of a writ of summons for a money demand against the plaintiff, and claims to be entitled to exercise the right under this provision because of a writ issued at his own suit to enforce payment of the amount of the advance by action on the covenant for payment contained in the mortgage of real estate. There has been much discussion with regard to the circumstances under which this writ was issued. But I do not deem it necessary to consider this branch of the argument, for I think that the provision does not extend to the issue of a writ by the defendant for the same money demand as the chattel mortgage is given to secure. I think it should be read as meaning the issue of a writ for a money demand other than the defendant's demand under the mortgage. The object was to enable him to take steps to protect himself, if, while there was no default in respect of his own claim, another claim was pressed by the issue of a writ against the plaintiff. The other provisions of the chattel mortgage afford ample protection to the defendant in the case of the

plaintiff's default in making payment of the secured debt or the interest or any part thereof.

Fifthly, the defendant sought at the trial to be permitted to set up and rely upon an alleged breach by the plaintiff of the condition against selling or attempting to sell the goods without the defendant's consent. The learned Chief Justice refused to allow the defence, being of opinion that the proof given in support of the alleged selling or attempting to sell was insufficient to support the charge, and there is no reason for differing with him.

Lastly, the defendant contended that the damages were excessive; but the sum awarded is quite reasonable under the circumstances. This is not a case of the mere issue of a writ of summons for an unfounded claim, and a seizure in good faith under the belief that the proceedings were proper. The defendant having through his own neglect allowed the time for renewal of his chattel mortgage to go by, and being irritated with the plaintiff's desire to rectify what he believed to be a mistake in the chattel mortgage, cast about for some method by which he could gain an advantage or put the defendant at a disadvantage. He adopted the plan of issuing a writ of summons for a money demand, and made that the pretext for seizing the goods under the chattel mortgage, and thereby put the plaintiff to considerable trouble, inconvenience, expense, and loss.

There is no ground for interfering with the adjudication as to damages or the costs of the action.

The judgment should be affirmed with costs.

OSLER, J.A., wrote a concurring opinion.

ARMOUR, C.J.O., expressed no opinion.

LISTER, J.A., died while the case was sub judice.

SEPTEMBER 19TH, 1902.

C. A.

RITCHIE v. VERMILLION MINING CO.

Company—Mining Company—Directors—Power to Sell Lands—Irregularity — Shareholders — Directors—Qualification—Injunction Restraining Sale.

Appeal by plaintiffs from judgment of STREET, J. (1 O. L. R. 654) dismissing action to restrain the defendant company from selling their mining lands, under the circumstances set out in the judgment below as reported.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, J.J.A.

A. B. Aylesworth, K.C., and N. F. Davidson, for appellants.

Wallace Nesbitt, K.C., for defendant company.

W. R. Riddell, K.C., and R. McKay, for individual defendants.

MACLENNAN, J.A.:—The first question on the appeal is whether the company has power to make the sale sought to be restrained. . . . The Companies Act restricts the power of a company to acquire lands to what is necessary for the carrying on of its undertaking; and the Mining Act confines it to what is necessary for the company's mining, milling, reduction, and development operations. And in neither case is there any express qualification of the power of alienation.

I am unable to see that any restriction upon the express power of alienation can be implied. The company is not limited to the purchase, for their purposes, of any particular parcel or parcels of land, except perhaps that they are confined to the district of Algoma. They might buy land for a mine and find it unsuitable, or not so suitable as other land. Why should they not have the same liberty as a private person to act from time to time as they deem to be for their interest, and to sell and buy as their interest seemed to require? It is said that the sale of this land is a sale of the company's business, and so is *ultra vires*. I do not think so. There is nothing to prevent the business being continued by the purchase of other mines, or mining lands, afterwards; and it is for the company to determine what shall be done afterwards. *Wilson v. Miers*, 10 C. B. N. S. 348, cited in the judgment below, appears to me to be a distinct and satisfactory authority on this point, and a case which I have not found doubted anywhere. I also refer to *Hovey v. Whiting*, 13 A. R. 7, and 14 S. C. R. 515.

The next ground taken by the appellants is, that a sale would be injurious to plaintiffs. The answer to that is, that the affairs of a company must be managed according to the judgment of the majority of shares, by which the directors, the executive body, are elected; and so long as what is done is legal, it cannot be prevented, or undone, merely because it may be disadvantageous to a minority of the members. It is said that defendants, who control 2,383 shares out of a total

number of 2,400, are selling this property not so much in the interest of the defendant company as in the interest of the Canada Copper Company, another mining company operating in the neighbourhood of the defendant company's lands, in which they are large shareholders; and not only so, but that their action is or will be ruinous to the defendant company. That may even be so, and yet, if the company has the legal power to make this sale, as I think it has, the plaintiffs are without remedy. [Reference to *Pender v. Lushington*, 6 Ch. D. at p. 75 et seq.; *North-West Transportation Co. v. Beatty*, 12 App. Cas. 589.] . . .

It is clear that the Court could not compel the company, or its directors, to proceed with the development of the property, or to work its mines; and if it chose to suspend for a long time, or even to abandon, all mining operations, the Court could afford plaintiffs no assistance, and the motives of such conduct would be immaterial. It appears also that the shares were ultimately paid for with the money of the rival company, and have been since the commencement of the action divided ratably among the shareholders of the other company.

It was further contended that the proceedings by which the sale was authorized were irregular and void, and that the company were not bound by them; that the meetings of the shareholders and directors respectively were not properly called; and that the directors were not only not duly elected, but that they were not legally qualified.

But whether the meetings of shareholders were regularly called or not, there is no doubt that only a small portion of the shares were unrepresented at any of them. And at the meeting of shareholders on the 16th July, 1897, at which the sale of the property was authorized, 2,296 shares were represented, of which 2,289 voted in favour of the sale, and only 7 against it.

The same observation may be made as to the annual election of directors. Whatever irregularity there may have been, or want of qualification, everything that was done by the directors was approved of by the vast majority of the shares.

With regard to the objection to the qualification of the directors, which is, that they held their shares as trustees for the rival company, and not absolutely in their own right, as required by sec. 42 of the Companies Act, I think it by no means clear that the shares were held in trust. There was no express trust, and the 7 shares excepted from the resolution of 26th August, 1890, were intended as a qualification of the

directors, and may have been a transfer to them, in advance of the ultimate distribution of the shares among the shareholders of the other company. If the shares held by the directors or any of them were actually held in trust, and not beneficially, I do not think, having regard to *Pulbrook v. Richmond*, 9 Ch. D. 610, *Cooper v. Griffin*, [1892] 1 Q. B. 740, and *Howard v. Sadler*, [1893] 1 Q. B. 1, we could hold them qualified. The language of our Act is much stronger than that of the English Act, by reason of the use of the word "absolutely," and I think we ought to hold it to mean a beneficial holding. That difficulty, however, was got over shortly after the commencement of this action by the transfer to each of the defendants of a considerable number of shares beneficially.

But I am of opinion that the company having power to do what is sought to be restrained, the plaintiffs cannot succeed on any ground of mere irregularity. The company is made a defendant, and is here on the face of the record ratifying and confirming what has been done, and insisting upon what has been begun being proceeded with.

I think the appeal must be dismissed.

Moss, J.A. (after discussing the statutes and the evidence):—It seems to me impossible to say that the company has not the power to sell the real estate in question, if in good faith the majority of the shareholders decide to do so.

I do not say that if upon the face of the letters patent it plainly appeared that the main purpose of the company was the acquisition of and working the mines upon the properties in question, and that this purpose formed the foundation of the company, it might not even yet be held that it was not within the power of the company to put an end to that purpose by a sale of the properties without the consent of all the shareholders. But this does not and cannot be made to appear. The sale of these properties need not disable the company from carrying on its operations as a mining company within the District of Algoma. It does not work a dissolution of the corporation nor put an end to its powers.

I agree, therefore, that the company has power to make sale of the properties in question. I think the objections to the status of the directors have been properly disposed of, and that it was competent for them to proceed with a sale under proper conditions.

But I am of opinion that the proposed sale on the 14th May, 1901, ought not to have been allowed to proceed, and that, while as to all other matters the action was rightly dismissed, it ought to have been retained for the purpose of enjoining that sale.

The attempt to sell without having put the properties into a condition in which they might be properly inspected and examined by intending purchasers, and fixing the date of the sale at a time which rendered any inspection or examination before it was held a matter of extreme difficulty, if not an impossibility, was not a compliance with, but, on the contrary, a violation of, the spirit of the order of the 21st August, 1897, in pursuance of which the defendants were professing to make the sale. . . .

Under the circumstances, if the sale had taken place as intended, it could not have failed either to have proved wholly abortive for want of bidders or to have resulted in the properties falling into the hands of the Canada Copper Company, as the plaintiffs allege the defendants designed they should, at an inadequate price.

The proceedings in Court arrested the sale, and there is now an opportunity of bringing the properties into the market in such manner as to secure the most favourable terms of sale and protect the interests of all the shareholders.

It is not now necessary to retain the action, but I think that, inasmuch as the plaintiffs were right in their contention on this branch of the case, though they failed in the others, there ought to have been no costs of the action and there should be no costs of this appeal.

ARMOUR, C.J.O., and OSLER, J.A., concurred.

MASTER, J.A., died while the case was sub judice.

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No. 32

OSLER, J.A.

SEPTEMBER 18TH, 1902.

C. A.-CHAMBERS.

RE WEST WELLINGTON PROVINCIAL ELECTION.

PATTERSON v. TUCKER.

*Parliamentary Elections—Petition—Deposit—Payment out—Petition
Abandoned before Service—Grounds of Abandonment—Affidavits
Denying Collusion.*

Motion by solicitors for the petitioners for an order to pay out of Court the sum of \$1,000 paid in as security for costs of the petition. The application was supported by the written consent of the three petitioners, verified by affidavit; by the affidavit of one of the solicitors for the petitioners; and by a consent signed by solicitors who described themselves as solicitors for the respondent, to the order applied for. From the affidavit of the solicitor for the petitioners it appeared that the petition was presented to the Court on the 27th June, 1902, by being filed in the office of the local registrar at Guelph, and that the \$1,000 as security for costs was paid in on or about the 2nd July, 1902. Then it was stated that after the deposit had been paid into Court "those persons interested in the promotion of the petition, including the petitioners," were of opinion, "that it was not wise to proceed further with the petition," and the deponent's firm was accordingly instructed to do nothing more, and the petition was not served upon the respondent, and no further steps were taken in regard thereto.

H. G. Long, for the applicants.

OSLER, J.A.:—It may be assumed, though the petition was not before me on this application, that it was accompanied by the affidavit of the several petitioners, as required

by law, that they presented it in good faith, and that they severally had reason to believe and did believe the statements contained in the petition to be true in substance and in fact. This is not an application for leave to withdraw a petition, as the petition, though presented, was not served. The course which has been adopted put an end to the petition, and effectually stood in the way of the appearance of any intervenor, and also of the taking of proceedings by any other person to set aside the election on the grounds believed by those who thus abandoned the petition to be true in substance and in fact. Under these circumstances, I am not bound to make an order for payment out of the deposit on the materials presented, and am entitled to be judicially informed of the grounds on which it was deemed by those interested in the prosecution "not wise" to proceed further. Affidavits are, therefore, to be filed stating those reasons, and by the petitioners and their solicitors and the solicitors for the respondent, who appears to have solicitors in the matter, although he was not served with the petition, denying all collusion, to the same extent and in the same manner as on a motion for leave to withdraw the petition. Should there be any difficulty in obtaining these affidavits or any of them, the matter may be mentioned again.

BOYD, C.

SEPTEMBER 22ND, 1902.

CHAMBERS.

RE YATES.

Legacy—Charge on Land—Interest—Legatee also Administrator with Will Annexed—Statute of Limitations.

A testator died on 8th November, 1892. By his will \$300 was charged on land devised to his daughter Harriet, to be paid to his daughter Maria six months after his death. The daughter Harriet was made executrix, but she predeceased him, on the 1st May, 1892. Thereupon letters of administration with the will annexed were granted to the other daughter, the legatee, on 12th December, 1892. This daughter did not sell the estate to pay herself the legacy charged on the land, but held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties.

A motion was made under Rule 938 on behalf of the infant child of the deceased devisee for an order determining whether the legacy to the daughter Maria should be paid with interest.

J. Hoskin, K.C., official guardian, for the applicant.

D. W. Saunders, for the legatee.

BOYD, C.—The question is, whether the legacy should be paid with interest from the date of six months after the death of the testator to the present time. Where the hand to pay and the hand to receive are the one and the same, the Statute of Limitations has no application. The claim for the \$300 subsists, and therewith interest as an accessory for the period till the fund is in hand for payment: *Binns v. Nichols*, L. R. 2 Eq. 256; *Seagram v. Knight*, L. R. 2 Ch. 628.

BOYD, C.

SEPTEMBER 22ND, 1902.

CHAMBERS.

FAIRFIELD v. ROSS.

Administrator ad Litem—Appointment of—Rules 194, 195, 196.

Motion by the plaintiff for an order appointing an administrator ad litem to the estate of M. Fairfield, deceased.

H. L. Drayton, for plaintiff.

R. C. Clute, K.C., for defendants.

BOYD, C.—The action is to recover the estate of a person deceased, who died without will, and who conveyed the estate in question to the defendants before death. The action is brought by the sole next of kin—no personal representative having been appointed. The application was to appoint the plaintiff by summary order under Rule 194. For reasons given in *Hughes v. Hughes*, 6 A. R. 380, upon the original of this Rule, I am precluded from making such an order, as the case does not fall within the provisions of the Rule. Nor do I think that an order under Rule 195 would help the plaintiff. That authorizes no more than the grant of limited administration ad litem; but the object of this suit is substantially to get in the whole estate—it involves general administration according to the practice of the court: *Dowdeswell v. Dowdeswell*, 9 Ch. D. 306; Rule 196. The very frame of the Rule indicates that it is not applicable to the case of a plaintiff who, without right or title, has commenced an action, and then seeks to legalize his illegal act by an order of the Court. The Rule applies to a case where “in an action,” i.e., an action validly begun by a competent plaintiff, “representation of an estate is required” as a condition for its effective prosecution, and thus in a proper case an administrator ad litem may be appointed.

Application refused with costs.

MACLENNAN, J.A.

SEPTEMBER 22ND, 1902.

C. A.—CHAMBERS.

McAVITY v. MORRISON.

Appeal—Court of Appeal—Leave—Excision of Pleadings,

Motion by plaintiffs for leave to appeal from the order of a Divisional Court affirming an order of LOUNT, J., in Chambers (ante 552), dismissing plaintiffs' motion to strike out parts of the defence and counterclaim as improper, irrelevant, embarrassing, and tending to prejudice the fair trial of the action, and because the claims by way of counterclaim are not properly so made and are contrary to the rules of practice.

D. L. McCarthy, for plaintiffs.

G. H. Watson, K.C., for defendants.

MACLENNAN, J.A.—It is only in a very plain case of impropriety that the Court ought to order pleadings or paragraphs thereof to be struck out. This is not such a case, and that view having been taken by LOUNT, J., and by a Divisional Court, the discretion conferred by sec. 77 of the Judicature Act ought to be exercised by refusing the leave.

Motion refused with costs.

OSLER, J.A.

SEPTEMBER 23RD, 1902.

C. A.—CHAMBERS.

MIDDLETON v. SCOTT.

Appeal—Court of Appeal—Leave—Mortgage—Redemption—Tender.

Motion by plaintiffs for leave to appeal from an order of a Divisional Court (ante 536) affirming order of STREET, J., on defendant's appeal from the report of a Master. The action was by mortgagors against mortgagee for redemption. One question was whether a valid tender had been made of the amount due before action, or whether a tender had been dispensed with. Another was as to the rate at which interest should be computed after the principal fell due. It was held both by STREET, J., and the Divisional Court, that the tender was not sufficient, and that plaintiffs had not by words or conduct dispensed with the necessity for a legal tender. This only affected the question of the costs of the action.

M. Wilson, K.C., for plaintiffs.

W. E. Middleton, for defendant.

OSLER, J.A.—Two Courts, one of them of plaintiffs' own choosing, having passed against them, and considering what is now at stake in the action, viz., costs only, it would be a wrong exercise of discretion to grant leave to bring a further appeal, even assuming, as the plaintiffs very strongly urge, that the judgments below are open to criticism as having proceeded upon some misconception of the facts or wrong view of the law. The case is just such a one as, even if possibly wrongly decided, ought not, under all the circumstances, such as the subject matter and amount involved, the nature of the dispute, its origin, etc., to be further litigated. The Divisional Court have placed the right construction upon the judgment at the trial and the Rule of Court in holding that, in the event which has happened, of failure by the plaintiffs to prove tender, or dispensation of tender, the defendant became entitled to the costs. Had the question of costs been reserved by the original judgment, it is quite probable that the evidence would have justified the disposition which Street, J., made of them, i.e., giving them to neither party.

Motion refused with costs.

OSLER, J.A.

SEPTEMBER 23RD, 1902.

C.A.—CHAMBERS.

PEGG v. HAMILTON.

Appeal—Court of Appeal—Leave—Mortgage—Payment—Reference.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 418) affirming judgment of ROBERTSON, J., at the trial, dismissing the action, which was brought on a covenant contained in an old mortgage made by defendants to plaintiff, and was begun on the last or next to last day on which it could have been begun to save the running of the statute. The writ was not served on the defendants for nearly a year afterwards. The defence was payment. The amount involved was not quite \$1,000. The main question was in regard to the application of certain moneys which had undoubtedly been paid to plaintiff by defendants. If these were applied on the debt represented by the mortgage, plaintiff had no further claim. No question of law arose in respect of the application. It was entirely a question of fact. It was contended that the trial Judge should have referred the case, instead of trying and disposing of it himself.

A. B. Armstrong, for plaintiff.

S. B. Woods, for defendants.

OSLER, J.A.—The trial Judge had the right to dispose of the case. It is not suggested, even if that would now have been of any avail to plaintiff, that there really is any further information to be obtained of tangible value. The staleness of the claim and all the circumstances surrounding it, emphasized in the judgment of the Divisional Court, point strongly to the probability that there is no merit in it, and there being two concurrent findings to that effect, with which no possible fault can be found, leave to prosecute a further appeal should not be granted.

Motion refused with costs.

BOYD, C.

SEPTEMBER 25TH, 1902.

WEEKLY COURT.

RE ALLEN AND TOWN OF NAPANEE.

Municipal Corporations—Resolution of Council—Trimming of Trees in Streets—Towns and Villages—Powers of Council—Necessity for By-law.

Motion by Allen for a summary order quashing a resolution of the town council of Napanee, that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed." The Municipal Act, R. S. O. ch. 223, sec. 574, sub-sec. 4, relating to the planting and trimming of trees on or adjacent to streets, purports to confer jurisdiction to pass by-laws thereupon to the councils of cities, towns, and villages having a population of 40,000 or more. There are no towns and villages in Ontario with such a population. Yet sec. 575 contemplates that by-laws for cutting and trimming and removal of such trees on streets may be passed by towns and villages. Napanee is a town of 3,200 inhabitants.

C. R. W. Biggar, K.C., for the applicant, contended that the resolution was ultra vires, and that a by-law was at all events necessary.

W. E. Middleton, for the town corporation, contra.

BOYD, C.—I incline to think the proper construction of sec. 574 (4) is that towns and villages may pass by-laws authorizing some officer appointed for that purpose by the council to trim all trees, whether on or adjacent to the streets, whereof the branches extend over the streets. That is to say, power is conferred on the municipality to provide that these trees do not by their growth and extension of branches

"obstruct the fair and reasonable use of the thoroughfare." These quoted words are from the Tree Planting Act, R. S. O. ch. 243, sec. 2 (1), and are there applied to the tree itself as first planted, and the section in hand appears to be fairly readable as supplemental to that, so as to provide for the case of a tree rightly planted and by growth no obstruction as a whole, but yet becoming objectionable by its sweep and droop of branch.

Taking it that jurisdiction exists, yet the power of general supervision must be exercised by by-law. The power to interfere is conferred by the Municipal Act, and is to be brought into operation as that Act provides by sec. 325. Indeed sec. 575 expressly indicates that trimming is to be done under the provisions of a by-law. I refer to *Waterous v. Palmerston*, 20 O. R. 411, 19 A. R. 47, 21 S. C. R. 556.

Order made quashing resolution for informality, but, as its validity on the merits is favoured, without costs.

SEPTEMBER 25TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Appeal—Court of Appeal—Motion to Quash—Third Party—Appeal against Defendants—Making Plaintiff a Party,

A motion by the plaintiff to quash the appeal of the third party as against the plaintiff was heard at the same time as the appeal of the defendants against the judgment in favour of the plaintiff and the appeal of the third party as against both plaintiff and defendants. See the former reports, ante 440, 606.

J. H. Lennox and S. B. Woods, for plaintiff.

A. F. Lobb and W. C. Chisholm, for defendants.

J. Bicknell, K.C., and J. W. Bain, for third party.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

OSLER, J.A., holding that the motion to quash was a useless proceeding, as plaintiff was brought into Court on defendants' appeal, and both appeals were heard together. The third party was not wrong in making both defendants parties to the appeal. It was at all events a convenient course.

Motion dismissed with costs to be paid by plaintiff to third party.

STREET, J.

SEPTEMBER 26TH, 1902.

CHAMBERS.

REX EX REL. MCFARLANE v. COULTER.

Appeal—To Judge of High Court—From Order of County Court Judge Quashing Quo Warranto Proceedings—Right of Appeal—Power to make Order.

Appeal by relator from order of County Court Judge of Essex setting aside the fiat, the relation, and all proceedings taken thereon. On 21st January, 1902, upon the application of the relator, the Judge granted a fiat giving the relator leave, upon entering into the proper recognizance, to serve a notice of motion upon James A. Coulter, under sec. 20 of the Municipal Act, to set aside his election as reeve of the township of Colchester North. The proceedings were taken and styled in the County Court of Essex, and the recognizance was duly entered into and filed, and notice of motion served on the respondent on 21st January. On 10th March, 1902, respondent, by leave of the same Judge, gave a notice of motion, returnable before him on the 11th March, 1902, to set aside the fiat, notice of motion under it, and all the proceedings in the relation. On 21st March respondent's motion to set aside all the relator's proceedings was heard and judgment reserved. On 1st August the motion was granted, and the order in appeal made, setting all proceedings aside with costs.

W. M. Douglas, K.C., for the appellant, the relator.

J. H. Rodd, Windsor, for the respondent.

STREET, J.:—The appeal must be dismissed upon the ground that no appeal lies from the order appealed against to a Judge in Chambers. The proceedings were intituled and carried out in the County Court of Essex, and appeals from County Courts lie in ordinary cases to a Divisional Court. Under the Municipal Act of 1892, 55 Vict. ch. 42, sec. 187, sub-sec. 3, for the first time an appeal was given from the decision of the Judge trying the matter, to a Judge of the High Court. Such appeal is not from any interlocutory proceedings, but from the decision of the Judge in the matter upon the merits.

I express no opinion as to whether the County Court Judge had any power to make the order appealed against. No such power is expressly given him, and unless he have it by implication, which the Court of Appeal in *Regina ex rel. Grant v. Coleman*, 7 A. R. 619, thought he had not under the laws as it then stood, his duty was to go on and try the matter

on the merits. The change in the law effected by the statute of 1892 is such as to render the decisions referred to in that case no longer binding. The further change by 2 Edw. VII. ch. 1, sec. 15, does not seem to affect the present application, which was launched before that statute was passed.

BOYD, C.

SEPTEMBER 26TH, 1902.

WEEKLY COURT.

QUIRK v. DUDLEY.

Injunction—Repetition of Slander—Public Entertainment—Pretended Supernatural Revelations—Imputation of Murder—Pending Inquest.

Motion by plaintiff to continue injunction granted by local Judge at Brantford restraining defendant from continuing, in the course of entertainments given at Brantford, to make slanderous reflections upon the plaintiff in connection with the death of her husband.

J. H. Couch, for plaintiff.

M. F. Muir, Brantford, for defendant.

BOYD, C.:—The complaint of plaintiff, as it comes before the Court on the affidavits, is uncontradicted by any evidence for defendant; it stands confessed that there has been an outrageous attack upon the character of plaintiff, ventured upon at a public entertainment by means of suggestions that she has been privy to the violent death of her husband. The defendant, posing as a mind reader, assumes, when in a state of so-called trance, to have before her mind's eye, visualized, the panorama of the assumed tragedy, and tells forth the details bit by bit. Some interesting additions appear to be reserved for future exhibitions or entertainments, and to restrain these the intervention of the Court is sought. Jurisdiction undoubtedly exists in libel or slander actions to restrain repetition of the defamatory words, whether written or oral. This case appears to be perfectly atrocious. In the most sensational manner, and to gather in a little filthy lucre in the way of admission fees, the public are given to understand that plaintiff is mixed up in some way with the murder of her husband. The mischief is enhanced by the fact that the revelations are published in the newspapers at Brantford, and all the while proceedings are pending concerning the manner of the husband's death before a coroner's jury impanelled in the same city, the inquest having been adjourned till 2nd December.

Monson v. Tussauds Limited, [1894] 1 Q. B. 671, and *Hermann Loog v. Bean*, 26 Ch. D. 306, followed.

Injunction continued until the trial or further order.

LOUNT, J.

SEPTEMBER 26TH, 1902.

TRIAL.

ANDERSON v. ELGIE.

Dower—Reference as to Damages—Arrears.

Judgment, ante 550, corrected by directing that no damages are to be allowed for arrears of dower.

FALCONBRIDGE, C.J.

SEPTEMBER 26TH, 1902.

TRIAL.

GUENOT v. GIRARDOT.

Promissory Note—Agent for Collection—Power to Compromise—Striking out Claim for Wages.

Action upon a promissory note and for wages, tried at Sandwich.

F. D. Davis, Windsor, and A. F. Healy, Windsor, for plaintiff.

J. L. Murphy, Windsor, and J. E. O'Connor, Windsor, for defendant.

FALCONBRIDGE, C.J.:—I find as a fact that the note sued on was indorsed by plaintiff and handed by him in November, 1901, after it became due, to Albert Guenot for collection as the agent of plaintiff, and that Albert Guenot never had any authority from plaintiff to make any settlement except to receive payment of the whole amount due thereon, and Albert Guenot subsequently handed back the note to plaintiff, who was and is the holder thereof. I find further that, if Albert Guenot had had authority to make any settlement for less than the face amount of the note, no settlement was in fact finally arrived at. Defendant never received back the note sued on, and of the \$50 which he paid to one Gignac, he has received back \$30, and can get the balance of \$20 when he wants it. The evidence about the claim for a balance of wages not being very satisfactory, I strike that claim out of the present suit, leaving it to be dealt with, along with defendant's claim on the two Guenots for rent, by the appropriate tribunal.

Judgment for plaintiff for amount of note and interest with costs.

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No. 33

MACLENNAN, J.A.

OCTOBER 2ND, 1902.

C.A.—CHAMBERS.

CENTAUR CYCLE CO. v. HILL.

Court of Appeal—Joint Appeal of Two Parties—Security Furnished by One—Payment into Court—Abandonment of Appeal—Motion for Payment out—Costs—Set-off—Increased Security—Limitation of Amount—Rule 830.

Motion by defendant Love to have paid out to him \$200 paid into Court as security for the costs of the appeal to the Court of Appeal by both defendants.

W. E. Raney, for defendant Love.

W. H. Blake, K.C., for defendant Hill.

W. E. Middleton, for plaintiffs.

MACLENNAN, J.A.—It appears that defendant Love has abandoned his appeal, having effected a settlement with plaintiffs (respondents) of the matters in dispute. The respondents do not object to the payment out, if, as between the appellants themselves, Love is entitled to have the money paid out to him. The objection that the motion for payment out ought to be made to a Judge of the High Court was waived, the parties agreeing to accept the decision of the learned Judge of Appeal, quantum valeat.

On the argument I decided that defendant Love was not entitled to succeed on his motion, defendant Hill desiring and intending to avail himself of the deposit and to proceed with the appeal. It appeared that, while the deposit was made by Love with his own money, the notice of appeal was a joint one, and the deposit was made in the name of both and for the joint benefit. It was, in effect, a loan or advance made by Love to or for the benefit of his co-defendant, which could not be recalled by undoing the purpose which it was intended to serve and to which it was applied. I, therefore, dismissed the motion with costs, but reserved the question of set-off.

By paragraphs 17 and 18 of the judgment appealed against, Love is entitled to be indemnified by Hill against all

amounts payable by him, Love, under the judgment, and to recover from Hill any amount so paid, and his costs of the action and the appeal from the Master's report. I, therefore, direct that the costs of Love's motion be set off against anything he may already have paid, or may ultimately have to pay, under those paragraphs of the judgment, as the result of the appeal.

Motion by plaintiffs for an order for increased security, on the ground that the appeal will be more than usually expensive.

W. E. Middleton, for plaintiffs.

C. W. Kerr, for defendant Hill.

MACLENNAN, J.A.:—As to the motion for increased security for costs, I think, having regard to the nature of the case and the proceedings before the Master and on the appeals from his report, the appeal will be more expensive than usual, and the security should be increased. But, upon the true construction of Rule 830, sub-secs. 1, 4, and 8, the sum paid into Court cannot be increased to more than \$400.

Order made for payment into Court of an additional sum of \$200. Costs of the motion to be costs in the appeal.

MACMAHON, J.

OCTOBER 3RD, 1902.

TRIAL.

STOKES v. CONTINENTAL LIFE INS. CO.

Fraud and Misrepresentation—Contract to Take Shares—Fraud of Agent—Notice to Company—Right to Recover Money Paid.

The defendant company employed defendant Nesbitt as their agent to solicit subscriptions for the shares of the company. They supplied him with application forms for stock, and with blank receipts for the moneys he might obtain from those who paid the first instalment on the stock. Nesbitt and one Acheson went to plaintiff and asked him to become a shareholder. Plaintiff was not a business man, but a retired farmer. He at first absolutely declined to become a shareholder. A good deal of persuasion was used by Nesbitt and Acheson, and at last plaintiff signed, in pencil, an application for 50 shares, Nesbitt agreeing that he would not use the application in any way and would not shew it, and would return it in three or four days, if required. That application was cancelled. On a subsequent occasion Nesbitt visited plaintiff alone, and plaintiff then signed, in ink, a second application for 50 shares, Nesbitt saying: "If you sign this application, I will give you an agreement executed by myself and Mr. Acheson by which we will be bound to take these shares off

your hands if you are, within three months, dissatisfied with your bargain, and we will sell them and pay your money back." After the application was signed, Nesbitt told plaintiff to meet him at a bank, and when plaintiff paid the money, Nesbitt would give him the agreement signed by himself and Acheson. Plaintiff paid the money, but never received the agreement. This action was brought against the company and Nesbitt to recover back the money so paid, the plaintiff alleging false and fraudulent representations by Nesbitt.

The action was tried at Stratford without a jury.

J. P. Mabee, K.C., for plaintiff.

E. Coatsworth, for defendant company.

R. S. Robertson, Stratford, for defendant Nesbitt.

MACMAHON, J.:—I find that Stokes was induced to part with his money on the promise that the agreement would be given to him at the bank when the money was paid; and he went there for the purpose of concluding the transaction on the basis of the agreement being executed by both Stokes and Acheson. . . . Nesbitt did not impress me favourably, and I could not, in the face of Acheson's denial of his having consented to sign any agreement, find that a promise was ever made by Acheson to Nesbitt to sign such an agreement. Nesbitt having got the plaintiff's money under the circumstances stated, I think he deliberately planned a fraud upon Stokes, whose money he obtained.

Before any allotment of stock was made to Stokes, he wrote to the company that the agreement had been promised him, and that Acheson repudiated having made any promise to Nesbitt to sign the agreement. So that, in fact, before there was any allotment of stock made or any stock certificate issued, the defendant company was aware of the alleged fraud of their agent.

Mr. Coatsworth contended that the agreement which Nesbitt promised to give Stokes was an independent collateral agreement of the agent acting on his own behalf, and not within the scope of his authority as agent for the company. The giving of the agreement referred to led up to and formed part of the very contract into which plaintiff consented to enter. On the strength of the agent's representation that Acheson had promised to execute the agreement, Stokes parted with his money, which was immediately forwarded by the agent to the defendant company. Nesbitt had no authority to make the fraudulent representation to Stokes which induced him to part with his money, but, as I have already said, that fraudulent representation formed part of the contract of which the company got the benefit.

[*Barwick v. English Joint Stock Bank*, L. R. 2 Ex. at p. 265, *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394-411, *Ranger v. Great Western R. W. Co.*, 5 H. L. C. 86. and *Adie v. Western Bank of Scotland*, L. R. 1 H. L. Sc. 145, referred to as justifying the conclusion that the defendant company were affected by the agent's fraud. *Nasmith v. Manning*, 5 A. R. 126, distinguished.]

The defendant Nesbitt was a proper party to the suit, and the plaintiff was not bound to elect against which party he would take judgment. See *Addison on Torts*, 6th ed., p. 748.

There will be judgment for plaintiff against both defendants for the sum of \$650, with interest from 12th December, 1899, together with costs of suit.

BELL, HORNE, MACWATT, CO. C.JJ. SEPTEMBER 1ST, 1902.

ASSESSMENT APPEAL.

RE UNITED GAS AND OIL CO. OF ONTARIO AND
TOWNSHIP OF COLCHESTER SOUTH.

Assessment and Taxes—Valuation of Property—Gas Pipes—Natural Gas Company.

An appeal by the company from the decision of the Court of Revision for the township of Colchester South confirming an assessment.

J. H. Coburn, Walkerville, for the appellants.

J. H. Rodd, Windsor, for the township corporation.

The judgment of the Board of County Court Judges was delivered by

BELL, CO. J.—The appellants were assessed in this township for the year 1902 for 44,626 feet of 8-inch pipe, all of which, with the exception of 594 feet, is on private property.

The Court of Revision confirmed the assessment.

All of the above pipe was, when the assessment was made, in actual use for conveying natural gas from the wells in an adjacent township to Windsor, Walkerville, and other places, where it was used for supplying heat.

It appears from the evidence that for a number of years prior to and including the first part of the year 1901, there was a large supply of gas, and the business of the company was carried on at a profit. It further appears that in 1901 there was a great falling off in the supply of gas, continued up to the present time, and that the income of the company was practically expended in the expenses connected with the carrying it on, notwithstanding an increase of 20 per cent. in the selling price of the gas.

Up to the passing of 2 Edw. VII. ch. 31 the company was liable to assessment for the cash value of the pipes "estimated as if appraised in payment of a just debt from a solvent debtor." On this basis the evidence is that 8-inch pipe should be assessed at 10 cents per foot, but only pipe on public property is assessable under the Act.

The statute passed at the last session has entirely changed the basis of assessment, and, when this assessment was made, the law was that "the pipes, conduits, etc., shall, when and so long as in actual use, be assessed at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises in and from the municipality, and subject to similar conditions and burdens, regard being had to all circumstances adversely affecting their value, including the non-user of such property."

The evidence herein shews that, owing to the failure in the supply of gas, there is practically no profit in carrying on the business, or that the profit is very small; that, notwithstanding continuous efforts to obtain a further supply by sinking new wells, no further supply has been obtained. Under these circumstances, what would be the actual cash value of the pipes, etc., "as the same would be appraised upon a sale to another company," etc.? The evidence, in our opinion, warrants the conclusion that as a going concern they could not be appraised as having any cash value. We are also of opinion that the pipes, etc., might properly be appraised upon a sale to another company at the price that they would bring in the market. We find that the cash value of the taxable pipe on public property is 594 feet of 8-inch pipe at 10c. per foot, making a total of \$59.40.

We are of opinion that the assessment should be reduced to this last mentioned amount.

The appellants are entitled to their costs.

WINCHESTER, Master.

SEPTEMBER 29TH, 1902.

CHAMBERS.

PARRAMORE v. BOSTON MFG. CO.

*Patent for Invention—Action for Infringement —Motion to Stay—
Proposal to Proceed in Exchequer Court to Avoid Patent.*

Motion by defendants to postpone trial of this action in order to enable them to bring an action in the Exchequer Court of Canada to set aside plaintiff's patent of invention. This action was brought to restrain defendants from infringing plaintiff's patent. The defendants delivered a defence

setting up prior user, want of novelty, that the patent was not a valid and subsisting patent, and also that plaintiff had imported the patented invention or caused it to be imported, contrary to the provisions of sec. 37 (b) of the Patent Act, and other defences. The defendants now sought, after issue joined, to have the trial postponed until they should have proceeded in the Exchequer Court to have the patent set aside on the ground of the contravention of sec. 37 (b).

G. H. Kilmer, for defendants.

J. W. Bain, for plaintiff.

THE MASTER.—Had the defendants brought their action for the purpose indicated, they would have been in a better position to support this application. It may be that their other defences to the action will be successful, and that there need be no further litigation between the parties. It would not be fair to stop plaintiff's proceedings, properly instituted, to enable defendants to defend themselves in another Court, while they have a sufficient defence in this Court. The trial Judge will, no doubt, if applied to at the trial, and if he consider it in the interests of justice, stay any judgment to enable defendants to prosecute their rights in another Court, if they have no right to do so before him.

Motion referred to the trial Judge.

MEREDITH, C.J.

SEPTEMBER 29TH, 1902.

CHAMBERS.

METALLIC ROOFING CO. v. LOCAL UNION No. 30,
AMALGAMATED SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION.

Parties—Unincorporated Voluntary Association—Motion to Strike out Name—Injunction—Trial.

Appeal by defendant association from order of Master in Chambers (ante 573) dismissing their application for an order striking their name out of the style of cause.

J. G. O'Donoghue, for appellants.

W. N. Tilley, for plaintiffs.

MEREDITH, C.J., affirmed the order, but added to it a declaration that the dismissal of the appellants' motion is to be without prejudice to their raising any questions as to their status or liabilities on the pleadings, and varied it as to costs by making the costs of the application costs in the cause. Costs of appeal to be costs in the cause also.

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BOYD, C.

OCTOBER 6TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Municipal Elections — Irregularities at Poll — Aldermen of City — Election by General Vote — Voters Voting More than Once — Affecting Result.

Appeal by relator from order of Master in Chambers (*ante* 590) dismissing application by relator to set aside the election of eleven persons as aldermen for the city of St. Thomas, at the general election held on the 6th January, 1902, upon the ground that the election was not conducted according to law.

J. M. McEvoy, London, for relator.

E. E. A. DuVernet and W. K. Cameron, St. Thomas, for respondents.

BOYD, C.:—While the matter is somewhat doubtful as to the case of the last successful candidate, Luton, it is very clear that the election of the other ten cannot be effectively impeached.

Luton polled 728 votes, and the next highest vote, of 706, was cast in favour of Price. Taking it that 90 votes, as found by the Master, were illegal—because that number of double votes were cast, contrary to the law as amended by the Municipal Amendment Act of 1901, sec. 9—and that all these votes could be attributed to Luton's total and deducted from it, that would leave Price ahead of Luton. But that would be an improper assumption. The error about double voting was a common one as to all parties. Luton himself was not active in the promotion of his election; he sought no votes in any way; and does not seem to have profited by the duplicate voting. The more reasonable assumption would be that the illegal and irregular votes were divided, and as many cast for Price as for Luton. Other makeweights of alleged irregularities cannot be brought in on the argument, which were not relied upon in the original notice, especially when they

are of comparatively trivial character: sec. 226. I am not disposed to disagree with the Master's conclusions, particularly having regard to the fact that this is a municipal election, good only for a year, of which the greater part has now elapsed.

Appeal dismissed without costs.

OCTOBER 6TH, 1902.

DIVISIONAL COURT.

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside—Conditional Appearance—Res Judicata.

An appeal by the defendants from the order of STREET, J., *ante* 592, affirming the order of the Master in Chambers, *ante* 569, refusing defendants' application to set aside proceedings on the ground of want of jurisdiction in the Ontario Court to entertain the action; and an appeal by the defendants, also, from so much of the order of BOYD C., of 26th September, 1902, allowing defendants to enter a conditional appearance, as directed that it should be without prejudice to any right that plaintiffs might have to set up *res judicata*.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., LOUNT, J.

A. B. Aylesworth, K.C., for the defendants the Colonial Investment and Loan Company.

W. M. Douglas, K.C., for the other defendants.

C. D. Scott, for plaintiffs.

THE COURT varied the order of BOYD, C., by striking out the part objected to, and varied the orders of STREET, J., and the Master by inserting a clause to the effect that the dismissal of the defendants' motion is to be without prejudice to defendants' right to plead want of jurisdiction.

Costs of appeal to be costs in the cause.

FALCONBRIDGE, C.J.

OCTOBER 7TH, 1902.

TRIAL.

WALKERVILLE MATCH CO v. SCOTTISH UNION
AND NATIONAL INS. CO.*Insurance—Fire—Contract—Authority of Agent.*

Action to recover \$3,083.45 under a fire insurance contract in respect of plaintiffs' factory at Walkerville, and contents. The defence was that the defendants had not issued a policy, and that they were not bound by a receipt issued in the name of one Davis, who had been an agent, but had been superseded.

A. H. Clarke, K.C., for plaintiffs.

O. E. Fleming, Windsor, for defendants.

FALCONBRIDGE, C.J.:—The material facts were not in dispute; the question was as to the proper inference from the facts. Davis said he ceased to be agent of the company in February, 1901. The special agent of the company, Rogers, confirmed this. The receipt in question was issued by one Mezger, signed by him in Davis's name, on the 25th April, 1901. The insurance was not entered in the register, the money for the premium did not reach any one who could be called an agent of the company till after the fire, and it did not appear that anything was known about the risk at the defendants' head office at Hartford till after the loss. Under these circumstances, the plaintiffs cannot recover. The doctrine laid down in cases like *Trueman v. Loder*, 11 A. & E. 589, has not been extended to an insurance contract. *Summers v. Commercial Union Assce. Co.*, 6 S. C. R. 19, seems to be against plaintiffs' contention.

Action dismissed without costs.

OCTOBER 7TH, 1902.

DIVISIONAL COURT.

OTTAWA GAS CO. v. CITY OF OTTAWA.

Costs—Right of Party to Costs against Opposite Party—No Liability to Solicitor—Corporation Solicitor Paid by Salary—Change in By-law of Corporation.

Appeal by plaintiffs from order of STREET, J., in Chambers, reversing decision of local Master at Ottawa that de-

defendants were not entitled to tax profit costs against plaintiffs, defendants being under no liability to pay costs to their solicitor.

H. T. Beck, for plaintiffs.

J. H. Moss, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.:—Judgment was pronounced in this action on the 14th September, 1901, dismissing the action with costs. The defendants brought in their bill of costs for taxation. It was objected by the plaintiffs that the arrangement between the defendants and their solicitor was such as according to law disentitled the defendants to recover more than disbursements. The local Master and deputy registrar at Ottawa decided in favour of the contention of the plaintiffs. Upon appeal to my learned brother Street, the Master's decision was reversed, that learned Judge being of opinion that the defendants were entitled to their profit costs, as well as to the disbursements.

At the time judgment in the action was pronounced, the arrangement between the defendants and their solicitor was that he was to receive a salary of \$1,800 a year, for all services, including the costs of litigation in which the clients should be engaged. The by-law providing for that was passed on the 21st February, 1898. On the 10th July, 1902, a by-law was passed amending the earlier by-law, by providing that, in addition to the salary, the solicitor should be entitled for his own use to the costs of actions which he prosecuted or defended for his clients in which costs were recovered.

My learned brother Street was of opinion that the later by-law was the one which governed the rights of the parties.

Upon the argument before us, Mr. Moss, while not giving up that point, did not strongly urge it, and it seems to us that that position cannot be maintained. The judgment, as I have said, was pronounced on the 14th September, 1901, and the question, as it seems to us, is, what were the rights of the defendants in the circumstances as they existed at that date, and not what they were on or after the 10th July, 1902.

If it were not so, a client might arrange with a solicitor that he should conduct litigation without any charge to him at all, and in the event of success the agreement might be afterwards varied by providing that the solicitor should receive his profit costs as well as his disbursements. The statement of that proposition seems to me to contain the answer

to the position which was given effect to by the judgment in appeal.

Mr. Moss, however, attempted to support the judgment upon another ground argued before Mr. Justice Street, but as to which that learned Judge did not find it necessary to express an opinion. His contention was that the case of *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, was not applicable to such an agreement as that between the solicitor and client in this case. That case was followed (the late Sir Adam Wilson, dissenting,) in a case of *Stevenson v. City of Kingston*, 31 C. P. 333, and has been recognized in subsequent cases, to which it is unnecessary to refer, and also by the Legislature in the amendment which it made to the Municipal Act, sec. 320, sub-sec. 3, enabling a solicitor to tax costs under an agreement such as that which was effected between the solicitor and the clients by the agreement authorized by the by-law of the 10th July, 1902.

Mr. Moss in his able argument referred to and relied upon the case of *Galloway v. Corporation of London*, L. R. 4 Eq. 90, and also upon *Henderson v. Merthyr Tydfil Urban District Council*, [1900] 1 Q. B. 434.

There is no doubt that the judgment of Vice-Chancellor Wood in the *Galloway* case is opposed to the decisions in our Courts, and the practice which has prevailed here; and *Henderson v. Merthyr Tydfil* perhaps is also, although in the latter case reliance was placed upon the provisions of the English Attorneys' Act of 1870, which authorized an agreement between a client and solicitor for compensating the solicitor by a different rate of remuneration from that fixed by the tariff.

It seems to us that we ought to follow what we understand to be the principle of the decision in *Jarvis v. Great Western R. W. Co.*, which, as I have said, has been recognized and acted upon, and which is the well understood rule in this Province. It is true that in that case the agreement differed from the agreement between the solicitor and client in this case. In that case, the agreement was that the solicitor should receive an annual salary for all his services, and that if costs were recovered in litigated matters, he should also receive those costs; and some stress was placed in the judgment upon the fact that there was never any liability upon the part of the client to pay the solicitor these costs. They only became his in the event of their being recovered in the litigation.

In this case the agreement provides that costs which the corporation recovers are to be paid to the treasurer, and they

go, therefore, to reimburse the corporation *pro tanto* for the salary which it pays to its solicitor. Sir Adam Wilson in the Stevenson case, while dissenting from the view adopted by the majority of the Court, was of opinion that a provision such as that was objectionable and contrary to public policy.

In the Galloway case and in the Henderson case, it is said that, where a lump sum is payable as salary for all services, if it can be shewn that the client, as the result of the whole transaction, will have nothing or not as much as the taxed bill to pay, he is not entitled to profit costs, or that the taxed bill must be reduced to what he is liable to pay. It is pointed out that it is generally almost impossible for the opposite party to shew that such a state of things exists, and that, unless he can shew it, the fact that the solicitor is paid an annual salary does not disentitle the client to recover the costs of the litigation in which he has obtained an order for the payment of his costs by the opposite party.

As I have said, we think that we ought to follow the Jarvis case in our own Courts, and to leave it to the appellants, if they are dissatisfied, to take the opinion of a higher Court, where, possibly, the English practice, so far as it differs from ours, may be held to be the true rule.

The order of Mr. Justice Street, in our opinion, must be reversed, and the order of the local Master restored, with costs to the appellants.

OCTOBER 7TH, 1902.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Discovery — Affidavit of Documents — Admission of Possession of Document — Admissions on Examination for Discovery — Re-examination after Examination Closed.

Appeal by defendant Booth from order of BOYD, C., in Chambers, reversing an order of the local Master at Ottawa, and directing defendant Booth to file a further and better affidavit on production and to attend again for further examination for discovery.

D. L. McCarthy, for appellant.

J. H. Moss, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.,) was delivered by

MEREDITH, C.J.:—The appellant had filed an affidavit as to documents sufficient to satisfy the order on production. Some months afterwards he was examined for discovery, and was interrogated as to his having executed a certain document, referred to as exhibit 6, upon which the plaintiffs rely for the purpose of establishing their case. So far from there being any admission by the appellant that he had ever had in his possession or then had such a document, according to his recollection as then stated he never signed any such document. In these circumstances it appears to us that no case was made for requiring the appellant to make a further and better affidavit on production.

The affidavit, as I have said, was a sufficient compliance with the order, and, unless it was shewn, either from documents which were produced by the appellant which referred to other documents which were not produced, or from his admissions, that he had other documents, a further and better affidavit on production ought not, according to the practice, to have been required to be made. Contentious matter cannot be used for the purpose of obtaining an affidavit of that kind, nor can a party be cross-examined upon his affidavit on production; and, as was determined by Mr. Justice Moss, in one of the cases referred to (*Dryden v. Smith*, 17 P. R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly,—cross-examine upon an affidavit on production.

As to the other part of the order, that requiring the appellant to attend for further examination, we do not see how it can be supported. The respondents deliberately closed their examination, and no case was made, either upon the notice of motion or upon the material before the learned Judge, for directing further attendance,—if it be within the power of the Court to compel a party who has once attended for examination and made sufficient answer to such questions as were put to him, to attend again, which was disputed by Mr. McCarthy, and as to which we say nothing.

We think, therefore, that the order of the learned Chancellor must be reversed, with costs here and below to the appellant in any event of the action.

FALCONBRIDGE, C.J.

OCTOBER 8TH, 1902.

TRIAL.

HENRY v. WARD.

*Principal and Agent — Purchase of Goods by Agent — Commission—
Damages.*

Action by Joseph M. Henry and J. J. Kenyon, tobaccoists residing at Leamington, against Henry C. Ward, a tobacco dealer and cigar manufacturer, who did business at Leamington, to recover \$15,150 for purchasing for the defendant from tobacco growers in the Province of Ontario 2,000,270 pounds of tobacco at a commission of one cent per pound.

J. W. Hanna, Windsor, for plaintiffs.

E. S. Wigle, Windsor, for defendant.

FALCONBRIDGE, C.J.:—The defendant refused or became unable to carry out the terms of his contract with plaintiffs before they had done anything by way of proceedings leading to *ca. re.* or otherwise to impair defendant's chances of being able to fulfil his undertaking with plaintiffs, and through them with the tobacco-growers of the district. If plaintiffs neglected to any extent to superintend the planting, growing, or preparing of the tobacco, no damage resulted therefrom to defendant, but the only result, as matters have turned out, would seem to be that there has been so much the smaller quantity of tobacco of the required quality produced, and plaintiffs' commission will be thereby proportionately reduced. It matters not whether plaintiffs' claim be regarded as commission or damages. Sitting as a jury, I arrive at the amount grown under these contracts as 782,500 pounds, which means \$3,912.50 for each plaintiff or \$7,825 in all.

Judgment accordingly with costs.

WINCHESTER, MASTER.

OCTOBER 9TH, 1902.

CHAMBERS.

ENNIS v. READE.

*Pleading—Counterclaim—Striking out—Parties—Action by Execution
Creditor of Husband to Declare Wife Trustee of Land for Husband—
Counterclaim by Husband for Debt Assigned to Him.*

Motion by plaintiff to strike out the counterclaim.

Action by an execution creditor of defendant Edgar S. Reade to have it declared that his co-defendant, who is his wife, holds certain property as trustee for him, and that the same is exigible under the execution, and for the sale of such lands, etc. The defendant did not deny the plaintiff's judgment, but alleged that the property in question was purchased by the wife in her own name and on her own behalf, and that she did not hold it as trustee for her husband. The husband counterclaimed against plaintiff for \$250, and submitted to have it set off against the plaintiff's judgment. This amount was claimed under an agreement between plaintiff and the Canada Company, which was the subject of a County Court action by that company against plaintiff some time ago. That action was discontinued. The claim was assigned to the counterclaiming defendant. It was not clear whether the assignment was in trust for the company or not. The consideration was nominal.

J. J. MacLennan, for plaintiff, contended that it would be necessary to add the Canada Company as a party in order to dispose of the counterclaim.

J. R. Roaf, for defendants, contra.

THE MASTER:—Even if the counterclaim were admitted, it would not render the trial of the action unnecessary, as the amount due by the husband under the judgment was much greater than the amount of the counterclaim. The trial Judge, if the plaintiff succeeded, would, no doubt, direct a reference as to the husband's creditors and for the sale of the property, and he would have time to have his counterclaim disposed of in a separate County Court action, in which all the necessary parties could be added without any difficulty. I made an order striking out counterclaim, with leave to the defendant Edgar S. Reade to bring a separate action for the same cause. Costs of motion to plaintiff in the cause.

WINCHESTER, MASTER.

OCTOBER 9TH, 1902.

CHAMBERS.

HOWLAND v. PATTERSON.

Security for Costs—Plaintiff out of Jurisdiction—Property within Jurisdiction—Shares in Mining Company—Evidence of Value.

Motion by plaintiff to set aside an order for security for costs obtained on præcipe by defendant company, on the ground that plaintiff, though out of the jurisdiction, was

possessed of sufficient means within the jurisdiction of this Court to answer the costs of the action. In support of the application plaintiff filed his own affidavit, in which he claimed to be entitled to common stock of the defendant company, the Nickel Copper Company of Ontario, of the par value of \$147,000 or thereabouts, but he did not state what this stock could be sold for. He also examined the defendant Patterson in support of the application, but the latter stated that the stock could not be sold. In answer to the motion the defendant company filed the affidavits of the vice-president, secretary, and two of the directors of the defendant company, in which they stated that the common stock of the company was absolutely valueless and unsaleable; that the company had heavy liabilities, and creditors had obtained judgments which were unsatisfied. After this motion was launched the solicitor for plaintiff filed, on behalf of associates of plaintiff, a petition for the winding-up of the company.

R. C. Levesconte, for plaintiff.

G. H. Levy, for defendant company.

THE MASTER held that the affidavits of the directors of the company were conclusive as to the value of the plaintiff's stock, and, as he did not appear to have any other means within the jurisdiction, his application failed.

Motion dismissed with costs to defendant company in any event.

MEREDITH, J.

OCTOBER 9TH, 1902.

TRIAL.

DOMINION BANK v. EWING.

Promissory Note—Forgery—Notice—No Repudiation—Ratification—Estoppel.

Action upon a promissory note. Defence, forgery.

A. B. Aylesworth, K.C., and W. B. Milliken, for plaintiffs.

H. S. Osler, K.C., and F. B. Osler, for defendants.

MEREDITH, J.:—The note was not made by or with the authority of defendants; but, immediately after it was negotiated, they became aware, through a notice which the plaintiffs sent them, of it, and that the plaintiffs were the holders of it, relying upon its genuineness; and immediately after receiving such notice they communicated with the person who

had negotiated the note, and, at his instance and for his benefit, abstained from repudiating it until about four months afterwards. This they did against the advice of their solicitor, and in the belief that their failing to promptly repudiate would make them liable to pay the note. They took the risk in the expectation that the person who had negotiated the note would be obliged to, and would, take it up before maturity, and in order to screen and accommodate him meantime. Under these circumstances the defendants are liable. *Scott v. Bank of New Brunswick*, 23 S. C. R. 277, *Brook v. Hook*, L. R. 6 Ex. 89, *McKenzie v. British Linen Co.*, 6 App. Cas. 82, referred to. Whether there could be ratification, and whether there was ratification, the defendants were estopped from denying the making of the note. *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A. C. 257, 269, 270, and *Merchants Bank v. Lucas*, 15 A. R. 573, 587, referred to.

Judgment for plaintiffs for amount of note with costs.

BRITTON, J.

OCTOBER 9TH, 1902.

TRIAL.

HOLNESS v. RUSSELL.

Deed—Conveyance of Land—Cutting down to Mortgage—Imprudence—Fraud.

Action by Elizabeth Holness to have a deed of certain houses and land in the village of East Toronto, and a bill of sale of certain chattels, which she executed in favour of defendant, John Russell, on the 13th July, 1893, set aside and declared to be a mortgage only, and for an account of the rents and profits of the land, and a return of the chattels, or their value. She also alleged (in the alternative) that the transaction on her part was an improvident one, and that she acted entirely upon the suggestion and recommendation of defendant and without any independent advice. The defendant denied that there was any agreement that he should make a loan upon the security of the property, and asserted that he purchased both land and chattels for a fair price, \$1,200, which he paid to plaintiff.

E. Coatsworth, for plaintiff.

E. F. B. Johnston, K.C., for defendant.

BRITTON, J., after reviewing the evidence, held that, having regard to *McMicken v. Ontario Bank*, 20 S. C. R. 548, it could not be declared that the deed, absolute on its face,

was intended to operate as a mortgage only. As to the improvidence alleged, he held that the defendant had not taken undue advantage of plaintiff by reason of circumstances such as governed the decision in *Slator v. Nolan*, Ir. R. 11 Eq. 386, cited in *Waters v. Donnelly*, 9 O. R. at p. 401. The plaintiff was not at the time of the sale in "distress." She could not be charged with "wildness" or general "recklessness" or want of care. See *Wallis v. Andrews*, 16 Gr. 624; *Evans v. Llewellyn*, 3 Cox 333; *Fry v. Lane*, 40 Ch. D. 312. There, no doubt, was undervalue here, but not so gross as in itself to amount to evidence of fraud.

Action dismissed without costs.

OCTOBER 9TH, 1902.

C. A.

SAWERS v. CITY OF TORONTO.

Assessment and Taxes—Distress—"Owner"—Agreement for Purchase—Part Performance—Local Improvement Rates—Abandonment of Distress.

Appeal by plaintiff from judgment of BOYD, C., dismissing action for illegal distress for taxes. The facts are stated in the judgment appealed against, 2 O. L. R. 717.

J. W. McCullough and S. W. McKeown, for plaintiff.

J. S. Fullerton, K.C., and W. C. Chisholm, for defendants.

On the 19th September, 1902, the Court intimated that the appeal was dismissed.

On the 9th October the opinion of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—The Chancellor has seen fit, with, I think, probability at least on his side, to accept defendants' version, and to hold that there was no abandonment. We certainly ought not to reverse that conclusion.

Upon the other leading question, namely, whether plaintiff was an "owner," within the meaning of the Assessment Act, I have, after some doubt, come to the conclusion that the judgment appealed against is right in holding that he was an "owner," and not merely a tenant or occupant; and this is, of course, decisive of the action, because, if he was an "owner," his goods and chattels on the assessed premises were liable to seizure for the unpaid taxes, whether his

name is in the collector's roll or not: R. S. O. 1887 ch. 224, sec. 135, sub-sec. 1 (3).

[Re Flett and United Counties of Prescott and Russell, 18 A. R. 1, distinguished.]

Here the inquiry is, who, in the circumstances which exist, is the taxable owner? There must always be such a person somewhere after grant from the Crown. No other property interests are involved, and it, therefore, seems fair to look at the matter as if it were simply one between the vendor and the vendee under such an instrument, and, looking at it in that way, I think the proper conclusion is, that for the purposes of taxation the vendee who is in possession under such a contract as the one in question, is to be regarded as an owner and liable for the taxes. An additional reason for so holding in the present case is, that the plaintiff had agreed with his vendor to pay the taxes.

It was urged that there was no demand of payment, as required by sec. 134. The fair inference, however, is, upon the evidence, that such demand was duly made, as the learned Chancellor has found. Cogent evidence of the demand is, I think, to be found in the fact that plaintiff actually paid the first instalment. True, he now says this was paid in his absence by mistake; but it was paid with his money, and we find no evidence that he made any attempt upon his return to have the mistake rectified and the money refunded before this difficulty arose.

Then it is said the time for the return of the roll had expired, and the collector was therefore *functus officio*. The roll had not in fact been returned, and still at the time of the seizure was in the hands of the collector, who was still collector, and this was long ago determined, properly we think, to be all that is necessary to entitle him to proceed: *Newberry v. Stephens*, 16 U. C. R. 65; *Lewis v. Brady*, 17 O. R. 377; *McDonell v. City of Toronto*, 1 O. W. R. 494.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

HENNING v. MACLEAN.

Will—Construction—Alternative Disposition—Death of Testator and Wife "at the Same Time"—Lapse of Sixteen Days between Deaths—Intestacy.

Appeal by defendants Catherine Isabella Maclean, Minnie MacTavish, and the executors of the will of the deceased

defendant Marianne Ball, from a part of the judgment of a Divisional Court (2 O. L. R. 169) reversing the judgment of FALCONBRIDGE, C.J., at the trial, and declaring that the alternative provisions contained in the second paragraph of the will of the late Thomas Henning, made on the 10th June, 1887, never took effect, and that his estate descended to his next of kin as upon an intestacy, and that the executors appointed by the alternative provisions of the will, to whom probate was granted, became trustees for the next of kin. The testator, by the first clause of his will, gave all his estate to his wife and appointed her executrix. The second clause began: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property." And he then went on to divide his estate and appoint executors. The appellants were given life interests in part of his estate, and so was one of the plaintiffs, the testator's brother, John Henning. The executors proved the will, upon the assumption that the testator and his wife died at the same time, and retained the corpus of the estate under their control, paying out the income to the persons named as beneficiaries. The wife of the testator died on the 11th December, 1888, and the testator on the 27th of the same month. Both were ill at the same time, of the disease which caused their respective deaths, but there was an interval of 16 days between the two. The Divisional Court held that they were not "deprived of life at the same time," and, as the other event, of the testator surviving his wife, had not been provided for by the will, that he, in effect, died intestate.

A. B. Aylesworth, K.C., and A. S. Ball, K.C., for appellants, contended that the testator and wife both died, or were both dead, "at the same time," within the meaning of that expression as used in the will.

C. Robinson, K.C., H. J. Scott, K.C., and H. O'Brien, K.C., for plaintiffs.

J. G. O'Donohue, for defendant Clara Henning.

OSLER, J.A.:—I am unable to understand how two persons can, by any reasonable intendment, in the construction of plain language, be said to have been deprived of life "at the same time," no matter what may have been the cause of their deaths, when one of them has survived the other by a fortnight. If, therefore, the event of the testator and his wife being deprived of life at the same time was an event or

condition on the happening of which only the bequests provided for by the second clause of the will were to arise, I think they fail because that event did not happen. On the contrary, the testator survived his wife for the time I have mentioned, and, if that be material, was for the greater part of the period in such a condition as to be capable of making another will.

It is, however, suggested—though the point was not taken below—that, reading the first and second clauses of the will together, the latter should be considered as meaning “in case my wife does not survive me,” and that the testator meant by the language he has employed in the two clauses, to provide simply for the two events, that of his wife surviving him and that of her not surviving him. With all respect, I think that to adopt this construction would be to take an inadmissible liberty with the (to me) plain words of the instrument. To paraphrase it in this manner would be to make a will for the testator, and to provide for an event which, for anything we can know, he may have anticipated, reserving his intention to make a different disposition of his property if it should occur. What the testator tells us is practically this: “If my wife survives me, I give her all. If we should die at the same time by accident or otherwise—in which event she will of course take nothing and I shall have no opportunity of making another will—I provide for that event by the following dispositions. There is a third contingency—that of my surviving her—but, if that occurs, it will be time enough for me to consider what testamentary disposition I shall then make of my property.”

To read the second clause as merely saying “in case my wife does not survive me,” would be to include the two contingencies (1) of the testator and his wife both dying at the same time, which is what is expressly provided for, and (2) of her pre-deceasing him, which is not.

The language of the clause, I repeat, is to me too plain to warrant us in holding that the true contingency guarded or provided against, was the mere non-survival of the wife, and I, therefore, cannot treat the case as being ruled by such authorities as *Davies v. Davies*, 47 L. T. N. S. 40, and others of that class.

ARMOUR, C.J.O., and MOSS, J.A., gave written reasons for coming to the same conclusion.

MACLENNAN, J.A. (after referring to the terms of the will and the circumstances) :—The testator is making his will

in contemplation of his own death. That is what is uppermost in his mind. "I do make this my last will and testament." No contemplation of any subsequent or further will.

The first clause contemplates his wife being alive at his own death. He gives all to her in that case and makes her sole executrix. It is as if he had said: "I give all to her, if she shall be living at my death." He knows that if she should not be then living his gift to her would fail.

That case having been provided for, he next considers the case of her not being then living. That is the case which still remains to be provided for. It is said he has not provided for the general case of her not being then living, but only for one particular and very special instance of the general case, namely, the case of his wife dying at the very same instant as himself. If that is so, it is certainly very strange. However, he does proceed to consider, if not the case of his wife not surviving him, one of the cases of her not doing so, and what is to be done with his property in that case. He himself is dead, and what if his wife shall also be dead at the same time, by accident or otherwise, so as not to take his property as provided in the first clause? The phrase he uses is, "in case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request," etc. "Deprived of life" is equivalent to "dead," and the phrase is as if he had said "in case both my wife and myself should be dead at the same time." It is true, that language is large enough in itself to include the case of the wife dying after him, as well as the case of her dying before him, but he has already in the first clause provided for the first case, namely, that of her dying after him. That is provided for in the first clause, and the second clause will, if possible, be construed so as to be consistent with it. I think it cannot be denied that the event which has occurred is a case of both being deprived of life, that is, dead at the same time. The will is to operate at the testator's death and not before, and at the same time the wife is dead also. I think that is the true construction of the will. Unless it be so construed, the result is intestacy. The testator has failed to do what he intended to do, namely, to dispose of his property at his death. The Court favours a construction which prevents intestacy: *Jarmen*, 5th ed., 809 n. (1).

The scheme of the will is very simple. If his wife survived him, she was to have everything and be sole executrix. If she should not survive him, it was to go partly to his own relatives, partly to the relatives of his wife, and partly to

charity, and two of his wife's relatives were to be executors. He did not intend to die intestate to any extent. It was his last will and testament, and every intendment ought to be made of which the language, used fairly, admits to prevent intestacy. I think the language used admits of that.

In the case of *Davies v. Davies*, 47 L. T. N. S. 42, in order to give effect to the general scope of a will, Fry, J., held that the words, "in case of my wife dying within twelve months of my own decease," meant the case of her not being alive at the expiration of the twelve months, and so included the case which happened, namely, her having died before the testator.

If it were necessary to the decision of this case, which I do not think it is, to say that the testator's act was irrational and absurd if he meant to confine the disposition made in the second clause of his will to the case of his wife and himself dying at the same moment of time, and that he did not intend to provide for the general case of his wife not surviving him, but, in case of her dying before him, meant to die intestate, I should be compelled to say it was. I think the testator has used words which are capable of a meaning which gives effect to the testator's intention, and, that being so, I think we are bound to adopt that meaning. In the *Goods of Hugo*, 2 P. D. 73, referred to by the Chief Justice of the Common Pleas in his judgment, was a totally different case from the present. There the testator had made a will, and some years after he and his wife made a joint will expressed to be "in case we should be called out of the world at one and the same time by one and the same accident." It was held to be conditional, and the event not having occurred, inoperative, so as not even to revoke the previous will.

I think the appeal should be allowed.

GARROW, J.A., gave written reasons, to the same effect, for allowing the appeal.

Appeal dismissed with costs; MACLENNAN and GARROW, JJ.A., dissenting.

OCTOBER 9TH, 1902.

C. A.

RE LEACH AND CITY OF TORONTO.

Assessment and Taxes—Local Improvement Rates—Sidewalk—Lessee of Land from the Crown—Dedication of Private Way as Public Highway.

Case stated under the Assessment Act by the Lieutenant-Governor in council for the opinion of the Court.

The question involved was the right to charge lessees of property of the University of Toronto on College street, in the city of Toronto, holding under leases in existence at the date of the agreement between the city corporation and the University, confirmed by and set out in a schedule to 52 Vict. ch. 53 (O.), with a part of the cost of local improvements on College street. McDougall, Co.J., held, affirming the finding of the Court of Revision, that the lessees were chargeable, mainly on the ground that by the agreement in question College street had been made a public highway of the city.

The case was heard by OSLER, MACLENNAN, GARROW, J.J.A.

J. A. Paterson, K.C., for the lessee.

J. S. Fullerton, K.C., and A. F. Lobb, for the city corporation.

OSLER, J.A. (after setting out the facts at length):—

The question submitted to the Court is whether, in view of the deeds, documents, agreements, and statutes referred to, the said Leach or his interest in the property of the Crown so leased to him, is liable for local rates for the sidewalk in question; or whether the corporation of the city of Toronto is liable, under its covenants and agreements with the Crown, to maintain the sidewalks upon the said street in proper order at the expense of the city of Toronto, and so as to free the said Leach therefrom as a local improvement.

The main argument for the appellant proceeded, I think, upon a misconception of his position in relation to the lease to the city of 1859. He seems to have considered that, as a subsequent lessee of the Crown of lands fronting on the avenues, he had some right or interest in maintaining the conditions created by the earlier lease in respect of the city's obligation to keep the avenues in repair. I think this is a mistake. The appellant had, as lessee of the Crown, a right of access to and from the front of his premises. Of that he could not be deprived, and the city had covenanted with his lessor that he should be permitted to enjoy it. He had no right, as against the city, to compel them to keep the avenues in repair. The Crown had rights in that respect under the city's covenant, but these were rights which it might have released or refused to enforce, and they would come to an end with the forfeiture of the lease.

Short of interfering with his right of access, there was nothing in the situation of all three parties to prevent the

Crown from dealing with the city without regard to the appellant. It might have maintained the forfeiture of the lease, or might have reinstated it, with such variations in its terms as might be agreed upon; and of these, so long as the appellant's access was not interfered with, he would have no right to complain. The latter course was taken, the forfeiture was waived, the lease was set up again, the rental being increased from \$1 to \$6,000 per annum; and the Crown dedicated to the public, without restriction, the two principal avenues to the park, from Queen street and Yonge street, which the city had by the lease of 1859 agreed to keep in repair. I say without restriction, because the right reserved by the Crown to require the owners of property adjacent to the avenues who had not theretofore acquired rights of access thereto, to pay for the same, does not affect the appellant or the character of the highways so dedicated. The avenues became public highways which, by sec. 601 of the Municipal Act, are vested in the city, and the city is bound by sec. 606 of the Act to keep them as such in repair. The obligation of the city now, therefore, rests upon the statute, not upon its covenant, which ceases to have any application under the new state of things.

It was pressed upon us that the Crown could not, by dedication or otherwise consequent upon a private agreement between itself and the city, alter the character of the right of way which the appellant had over the avenues. The way was simply converted into a public highway, and I am not aware of any legal right of the appellant which was infringed thereby. His right of user of the road was not derogated from or made more onerous, and if new liabilities are or may be cast upon him as an adjoining property owner in consequence thereof, he is in no worse situation than a freeholder adjoining whose property a new street has been opened, or whose private right of way such as the appellant had over the property of another has been enlarged by expropriation or dedication of the land over which it exists as a public highway. The city's covenant with the Crown to permit persons in the situation of the appellant to have "free access through the park and avenues" necessarily came to an end with the forfeiture of the lease. We may suppose that as tenant of the Crown he would still have a right of access through the avenue. But this could not control the right of the Crown to dedicate the avenues as public highways, a right which it exercised in reinstating the lease.

It was also argued by Mr. Paterson that the third clause of the agreement shewed that the intention of the parties was that the estate or interest of existing leaseholders fronting on

the avenues should not become liable to assessment for local improvements. I think this clause is an attempt to provide for the case of future leaseholders, but it goes no further. There is no express exemption of others. They are simply left to the operation of the general law, which in the case of such an improvement as that in question here, viz., a plank sidewalk, appears to be found in sec. 677 of the Municipal Act. But in the case of other local improvements, the power to make which depends upon the consent, expressed or implied, given, or not withheld, of the owners of the property to be benefited, the question whether a person in the situation of the appellant, i.e., a lessee of the Crown under whose covenant "to pay taxes" no liability to pay taxes for local improvements to his lessor can arise or exist, can be regarded as an owner within the meaning of sec. 668 (2), and other clauses of the local improvement code of sections, is one of great importance, and, to my mind, does not admit of an easy solution in favour of the respondents. This, however, is not before us nor involved in the determination of the appeal.

The questions submitted will, therefore, be answered: that the interest of the appellant in the property leased by him from the Crown, on College street, is liable to be assessed for local rates for the plank sidewalk in question, under sec. 676 of the Municipal Act; and that the corporation is not liable under its former covenants and agreements with the Crown, or otherwise than under the Municipal Act, to maintain the same.

MACLENNAN, J.A., gave a written opinion to the same effect.

GARROW, J.A., also concurred.

OCTOBER 9TH, 1902.

C. A.

TOWNSHIP OF LOCHIEL, v. TOWNSHIP OF EAST HAWKESBURY.

*Way—Public Highway between Townships—Existence and Location
of — Boundary Line — Records of Crown Lands Department—
Surveys—Field Notes.*

Appeal by plaintiffs from judgment of FERGUSON, J., in so far as it was against plaintiffs, in an action brought for a declaration that a government allowance for a public road exists between the plaintiff township, in the county of Glengarry, and the defendant township, in the county of Prescott,

and between the respective gores of the townships, and that such allowance is upon the boundary line between the townships.

The questions upon the appeal were, whether there is a common and public highway between the townships, and if there is, where located.

These questions arise now more than a century after the supposed erection of the highway, and when no proof of any work on the ground can be obtained to aid in their determination.

The appeal was heard before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.

D. B. MacleNNan, K.C., and E. H. Tiffany, Alexandria, for plaintiffs.

J. Leitch, K.C., and C. G. O'Brian, L'Orignal, for defendants.

Moss, J.A.:—There are now no traces of the actual work upon the ground in the course of the original surveys. The finding as to the existence or not of an original allowance for road on the boundary between East Hawkesbury and Lochiel must depend upon the records in the department of Crown lands, and the proper inferences to be drawn from what is to be there found, taken in connection with the dealings of the department with the lands affected by them. And I think that it ought to be assumed, in the absence of evidence to the contrary, that in providing for and directing the survey of the townships in question, the department did not intend to depart from the usual practice in regard to surveys or to introduce any special or extraordinary features into it. So far as the instructions to Wm. Fortune to survey Hawkesbury can be gathered from the records, it appears that he was directed to conform to the general instructions already in his possession.

There is little reason for doubting that these embraced copies of such of the rules and regulations for the conduct of the land office department as pertained to the form and dimensions of townships, and that Fortune was well aware of the requirements applicable to laying out a township, whether situate on a river, as Hawkesbury was, or otherwise.

It seems clear that the invariable practice of the department, and of surveyors making surveys under the direction of the department, was to leave an allowance for a road between adjoining townships.

No record is shewn of any departure from this practice, unless the case of Hawkesbury constitutes one. Cases are spoken of in which a road only half a chain in width has been left, others where a chain and a half and even a double width or double allowance has been left, but no case of no allowance has been shewn, unless this case furnishes one. But I do not think there is anything in the facts or circumstances of this case to warrant us in assuming that such an unusual course was intended or adopted. Too much weight ought not to be attached to the circumstance that the copy of Fortune's plan of survey in the department does not indicate, by the presence of two lines at a distance from each other, which by scale would make the width of a road, the existence of a road on the boundary between Hawkesbury and Lochiel.

The same omission appears with regard to the roads in front of the concessions, although it is quite apparent from the field notes that an allowance for such roads was left in the survey. Rather ought the preference be given to the working plans on record in the department, which do shew the roads in both places. According to the evidence of Mr. G. B. Kirkpatrick, director of surveys in the department of Crown lands, it was not an unusual thing for the early surveyors to omit to shew allowances for roads by two parallel lines in their plans. The absence of lines to mark a roadway on a plan of survey made in the latter part of the 18th century is not inconsistent with a road having been actually provided for in the survey.

And when it is found that the department, in its working plans, compiled from the records of the survey, and such other information as it presumably had at the time, has recognized the existence of roadways, and that numerous patents for lots have issued with reference to the existence of such roadways, it should be taken that they were properly provided for in the survey, unless cogent evidence to the contrary is forthcoming.

The defendants rely strongly upon Fortune's field notes as shewing the absence of any provision for a roadway. I have endeavoured to follow them throughout, and I do not think they lead to the conclusion contended for by the defendants, but rather the contrary.

Upon the whole case I agree in the conclusion that there is a road allowance between the townships, not merely between East Hawkesbury and the gore of Lochiel, but also along the easterly boundary of Lochiel, and I think there ought to be a declaration to that effect. No owner of any of the lots held

under patents containing words of description appearing to carry the lands to the boundary between Hawkesbury and Lancaster, or to the easterly boundary line of Lancaster, or words of similar import, is before the Court, and, so far as this litigation is concerned, such owners are left in possession of whatever rights (if any) such words may give them.

ARMOUR, C.J.O., and MACLENNAN, J.A., gave lengthy reasons in writing for arriving at the same result.

OSLER, J.A., dissented, also giving his reasons in writing.

OCTOBER 9TH, 1902.

C. A.

MUTCHMOR v. WATERLOO MUTUAL FIRE INS. CO.

Fire Insurance—Conditions—Prior Insurance—Subsequent Insurance—Substituted Insurance—Assent—Estoppel—Findings of Jury.

Appeal by defendants from judgment of FERGUSON, J., in favour of plaintiff, upon the findings of the jury, in an action upon a policy of fire insurance.

A. B. Aylesworth, K.C., for appellants.

W. Nesbitt, K.C., and T. A. Beament, Orillia, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MOSS, J.J.A.) was delivered by

OSLER, J.A.:—The company defend the action on two grounds:—

1. That at the time of the application for the policy sued on, and at the time of issuing it, there was prior insurance upon the insured premises in another company, the Hand-in-Hand, to the extent of \$4,000, which was not assented to by defendants, and that no assent thereto by them is indorsed thereon, nor does it appear therein; and, therefore, under statutory condition 8 the defendants are not liable on their policy.

This defence fails. In the application for insurance in defendant company it is stated that there is prior insurance in two companies, specifying the Hand-in-Hand and the Sun Fire, apparently \$4,000 in each, with which the insurance applied for is intended to be concurrent. In defendants' policy they refer to the property insured by them as "represented in the application as otherwise insured for \$4,000, warranted concurrent," but do not specify the company in

which the insurance exists. They plead only a prior insurance in the Hand-in-Hand, not assented to, saying nothing about the Sun. The application proves notice to them of both, and it must be taken against them that this is the one they intended to assent to in the policy. . . . If there was also further insurance of \$4,000 (that is, \$8,000 in all), to which defendants' assent was not manifested, as required by the statutory condition, they have not pleaded that as a defence, nor would it be just to allow them now to set it up. It does not seem necessary that the particular company in which the prior insurance exists should be specified in the policy. The amount of such insurance was the important thing, and the application gave the necessary details. I am disposed also to agree that, if defendants did not intend to assent to the existing insurance for \$8,000 in all in the Hand-in-Hand and in the Sun, they were bound by the second statutory condition to point out in writing the particulars wherein the policy differed from the application: *Smith v. City of London Ins. Co.*, 14 A. R. at p. 330. . . .

2. The company's next defence arises under the second branch of the 8th condition, which declares that the company are not liable for the loss if any subsequent insurance is effected by any other company, *unless and until* the company (i.e., the former company) assent thereto, or unless the company do not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or do not dissent in writing after that time and before the subsequent or further insurance is effected.

The defendants rely upon two subsequent insurances effected by their insured, but not notified to or assented to by them, one in the London Mutual and the other in the Lancashire. These insurances were proved. As to the London Mutual, the plaintiff's answer is, that the Hand-in-Hand policy was cancelled, for what reason does not appear, and the London Mutual was merely taken in substitution for it.

There is some evidence that the policy in question was taken in substitution for the other. One was dropped or cancelled, and the other for a similar amount put on. There is no suggestion that the Hand-in-Hand Co. cancelled on the ground of fraud or doubtful character of the risk, and I do not see that the fact of the sum insured having been somewhat differently distributed in the later from what it was in the earlier policy, can affect the substance of the matter,

which is a consent once manifested in the prescribed manner, to a prescribed further insurance for a specified amount. I think there was evidence on which the jury could properly have found, as they did, that the one policy was merely taken in substitution for the other, and, that being so, the statutory condition is not infringed, the substituted insurance being covered by the standing consent: *Parsons v. Standard Fire Ins. Co.*, 43 U. C. R. 603, 4 A. R. 326, 5 S. C. R. 233; *Lowson v. Canada Farmers' Mutual Fire Ins. Co.*, 6 A. R. 512; *Moore v. Citizens' Fire Ins. Co.*, 14 A. R. 582; *Klein v. Union Ins. Co.*, 3 O. R. 234, 262.

The insurance in the Lancashire is in a different position. It was, no doubt, strictly a subsequent insurance, and the defendants are not liable on their policy unless they have assented thereto, or have so acted as to estop themselves from saying that their policy is not an existing one. No form of assent is prescribed by the condition, nor any time at which it is to be given. It, therefore, need not necessarily be manifested in writing, and may be given before or after the loss. Where such subsequent insurance has, in fact, been effected without notice, notice of it in writing is not a prerequisite to a valid assent. Such notice is necessary only where the insured intends to effect a further insurance thereafter, and to place the company under the obligation to dissent in writing within the prescribed time if they object to it; their failure to do which is equivalent to an assent. . . .

The jury found that the company's head office was aware, at the time of sending Corey, the adjuster, to the place of the fire, of all the insurances that are now complained of being on the risk; that the company intended by such act to treat the policy as valid and subsisting and binding upon it; and that the assured entered into an appraisal with the company's adjuster, and accepted such appraisal, and altered his position on the faith of it.

These findings are well supported by the evidence, from which also it ought, in my opinion, to be inferred that the defendants assented to the subsequent insurance in the Lancashire. Their defence as to this insurance is, therefore, displaced on the ground either of assent or estoppel, or both.

* * * * *

The case is distinguishable in many respects from *Western Assee. Co. v. Doull*, 12 S. C. R. 446, but mainly on the ground that in that case the insurance company had "no

notice nor any actual cognizance of the further insurance" when they instructed their inspector to adjust the loss. The terms of the condition, too, were very different from and more stringent than those in the case at bar, and the only notice the plaintiffs were able to prove was oral notice to an agent not authorized to receive it.

I refer to the following cases: *Smith v. City of London Ins. Co.*, 14 A. R. 328, 15 S. C. R. 75; *Morrison v. Universal Fire and Marine Co.*, L. R. 8 Ex. 197, 203, 205; *New York Life Ins. Co. v. Baker*, 49 U. S. App. 691, 697; *Missouri v. Note Bank*, 77 Fed. Rep. 117, 121; *La Fonderie Co. v. Stadacona Ins. Co.*, 27 L. C. Jur. 194.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

RICHARDSON v. WEST.

Deed—Reformation—Mortgage—Non-conformity with Contract for—Mistake.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing with costs an action for the reformation of a mortgage.

In July, 1899, the plaintiffs and the defendant James H. West signed the following contract: "I, James H. West, agree to purchase from James Richardson the Yarker mill property . . . for . . . \$5,500, \$1,000 of which I agree to pay down and to give a mortgage thereon for \$4,500 at 5 per cent. interest, said mortgage to be paid off in yearly instalments of \$1,000; the mortgagor to have the option of pay all cash due at any time without notice. James Richardson agree to above. Possession to be given 1st Sept., 1899, at latest." Although in the body of this contract the vendor was referred to as "James Richardson," it was signed "James Richardson & Sons," and they were the plaintiffs in this action. James Richardson was not a member of the firm.

The deed of conveyance and the mortgage deed were settled, executed, and registered.

The defendant James H. West obtained possession on the 1st September, 1899.

The mortgage deed provided for the whole of the money becoming due in five years from its date, instead of being payable, as in the contract provided, in yearly instalments of \$1,000. It was alleged by plaintiffs that the change was made by mistake, and that the mistake was not observed by them or by their solicitor until a year had elapsed.

It was proved, and found by LOUNT, J., that the defendant did not execute the mortgage under any mistake, but that both he and his solicitors observed the change made by plaintiffs' solicitor in the draft mortgage in the terms of payment, but had no objection thereto. LOUNT, J., held that if there was a mistake at all, it was a unilateral one, for which ordinarily there can be no reformation, and on that ground dismissed the action.

G. F. Shepley, K.C., for appellants.

A. B. Aylesworth, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, J.J.A.) was delivered by

MACLENNAN, J.A., who, after setting out the facts, proceeded:—Without saying that in no case would the Court reform a conveyance which, by the mistake of one of the contracting parties only, was not made in conformity with an antecedent agreement in writing, I think it clear it ought not to do so in this case. Cases may be imagined in which the mistake by the one party was obvious to the other, and was deliberately taken advantage of by the latter. See *Paget v. Marshall*, 28 Ch. D. 255; *May v. Platt*, [1900] 1 Ch. 616, 622, 623. But this is not a case of that sort. It is, of course, competent to the parties to a written agreement for sale to carry it out with any variations and additions they think proper, and nothing is more common than to do so. In this case the plaintiffs' solicitor in his draft of the mortgage introduced several things into the mortgage which the agreement did not stipulate for . . . for the benefit and advantage of his clients, the plaintiffs. . . .

I think the defendant and his solicitors had a right to suppose that all these proposed additions to and changes in the terms of the contract, most of which were for the plaintiffs' benefit, were sanctioned by the plaintiffs. . . . If there was no more in the case than this, it would be quite impossible for plaintiffs to succeed.

But when it is remembered that the defendant had brought an action for specific performance, that the dispute was upon the form and substance of the deed and mortgage, and that the action was settled by the execution and delivery of the deeds as they now stand, I think it is simply out of the question, there being no fraud or unfair conduct or dealing on the part of the defendant, to maintain this action.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

DOMINION RADIATOR CO v. BULL.

Bankruptcy and Insolvency—Assignment for Creditors—Sale of Estate by Assignee—Covenant of Purchaser to Pay Creditors—Enforcement—Privity—Trust.

Appeal by the defendant Hersee from the judgment of LOUNT, J., at the trial, in favour of plaintiffs in an action for the enforcement of the trusts of a certain deed and for payment of the balance of the full claim of the plaintiffs as creditors of the Hamilton Hardware Company. The facts are stated below.

The appeal was heard by OSLER, MACLENNAN, and MOSS, JJ.A.

G. Lynch-Staunton, K.C., and J. G. Farmer, Hamilton, for appellant.

D. E. Thomson, K.C., and D. Henderson, for plaintiffs.

MOSS, J.A.:—In the year 1899 the plaintiffs were creditors of the Hamilton Hardware Company, to the amount of \$1,924.59, or thereabouts. In September of that year the company made an assignment under the Assignments and Preferences Act to the defendant Bull. Subsequently an effort was made by one A. E. Hersee, the president of the company, to effect a composition with the creditors, with the result that a deed of composition and discharge was prepared and executed by the great majority of the principal creditors, including the plaintiffs, whereby it was agreed that A. E. Hersee was to pay to each of the creditors a composition of 40 cents on the dollar of their respective claims, on or before the 1st October, 1899, in consideration of which the creditors

were to release and discharge the company from all claims and to authorize the defendant Bull to deliver and convey to A. E. Hersee all the assets and property of the company.

Following these provisions was a stipulation that the agreement should take effect and become operative only when executed by all the creditors, but not before. It never was executed by all the creditors, and so never became operative to bind the creditors to accept 40 cents on the dollar of their claims against the company.

On the 2nd October, 1899, another transaction took place between the defendant Bull and the defendant Hersee, the result of which was that the defendant Bull, with the assent of A. E. Hersee, executed an instrument whereby, after reciting the assignment by the company to Bull, the offer made by A. E. Hersee to the creditors of a composition of 40 cents in the dollar, and that the creditors had accepted the offer and that the defendant Hersee had agreed to take upon himself the payment of the said composition to the said creditors, the defendant Bull granted, assigned, and transferred all the estate and assets of the company to the defendant Hersee upon and for certain trusts and purposes set out in the instrument. These were expressed to be as follows, viz., that the defendant Hersee should pay the aforesaid composition of 40 cents in the dollar on the claims of such of the creditors as had agreed to accept the same, and pay in full or make such settlement as he might be able of the claims of such of the creditors as had not agreed to accept such composition, together with preference and privileged claims and the costs incurred by the parties in respect of the assignment by the company to Bull. Subject to these payments, the defendant Hersee was to hold the transferred estate and assets to and for his own sole and only use for ever. And the defendant Hersee covenanted with the defendant Bull to pay "such composition and claims and from time to time and at all times well and truly save and keep harmless and fully indemnify" the defendant Bull.

The defendant Hersee received the estate and assets from defendant Bull, and proceeded to pay the creditors. The plaintiffs refused to accept the 40 cents in the dollar tendered to them, alleging that before the execution of the instrument of the 2nd October, 1899, they had repudiated their acceptance of the offer of composition, and had notified the company of their withdrawal from the agreement. Subsequently they brought action against the company for the recovery of

their claim. This action was defended, and a sum equal to 40 cents in the dollar of the claim was paid into Court, the money, it is said, being supplied by the defendant Hersee. The trial resulted in the plaintiffs obtaining judgment for the full amount of their claim, and the sum paid into Court was ordered to be paid out on account of the judgment.

The plaintiffs then brought this action, asking for the enforcement of the trusts of the deed of the 2nd October, 1899, and payment of the balance of their full claim, alleging that under its provisions the defendant Hersee became liable to pay the plaintiffs' claim in full, and that it was the duty of the defendant Bull to enforce the trusts of the deed for their benefit, but that he had refused to do so, or to permit the plaintiffs to use his name for the purpose of enforcing the deed.

The defence set up want of privity and inability of the plaintiffs to maintain the action, and also that, assuming the right to maintain the action, the right to be asserted and the relief to be obtained are the same and no higher or greater than can be asserted or obtained by the defendant Bull, and that the latter's right to relief is limited to compelling the defendant Hersee to pay 40 cents on the dollar of the plaintiffs' claim, and that in any case the relief should be limited to an account of the value of the estate and assets received by the defendant Hersee, and that such value did not amount to 40 cents in the dollar of the claims against the company.

There was a reply to the defence, setting forth at length the reasons which the plaintiffs alleged justified them in withdrawing from the composition, alleging that before the execution of the instrument of the 2nd October the defendant Hersee had notice of the plaintiffs' withdrawal, and assigning other grounds against the validity of the defence.

At the trial the plaintiffs undertook to prove notice to the defendant Hersee of the plaintiffs' withdrawal from the composition, but, as it appears to me upon a careful perusal and consideration of the testimony, they failed to adduce any evidence upon which such notice ought to be fastened upon the defendant.

The onus was upon the plaintiffs to establish the fact of notice to the defendant Hersee, if, as they appeared to think, it was essential to their case. But every witness called or interrogated upon the point distinctly denied that the defendant Hersee had seen or read or been told of the plaintiffs'

letter of withdrawal or had any knowledge of the fact of withdrawal until after he had executed the instrument of the 2nd October, and had paid a considerable number of the creditors the amount of the composition provided for by his covenant. The only scintilla of evidence of notice or knowledge that could be argued for was in some answers to questions addressed to the defendant Hersee when he was under examination in the former action. But the questions and answers as read at the trial of this action, disconnected as they were from the preceding and succeeding questions and answers, seem vague and unsatisfactory in view of the direct testimony and of the probabilities of the case. It would be unsafe, in my opinion, to found a conclusion of fact on them. It was argued that the learned Judge had not given credence to the testimony of the witnesses on the question of notice. But, as said by Lord Justice James in *Nobel's Explosives Co. v. Jones*, 17 Ch. D. at p. 739, "really that is a fallacy which we had occasion to refer to more than once in this Court, that a man supposes that he proves the affirmative because the witness for the negative is not wholly to be believed. Of course that is not so. The affirmative must be proved, and to say that a witness for the negative is not wholly to be believed, or that some other witness might be there, is in no sense of the word to prove the affirmative."

So far as it affects this case, therefore, I think it ought to be taken that the fact of notice to the defendant Hersee of the plaintiffs' withdrawal from the deed of composition before he executed the instrument of the 2nd October, ought to be taken as not established.

The plaintiffs are not impeaching the transaction between the defendants Bull and Hersee. On the contrary, they have adopted it, and ask to have the trusts of the instrument of the 2nd October enforced for their benefit. Their right to maintain this action in their own names against the defendant Hersee must depend on the circumstance that the property and assets passed to the defendant Hersee impressed with a trust. Probably that is the only substantial distinction between this case and *Henderson v. Killey*, 18 S. C. R. 698, more fully reported in 11 Occ. N. 88. But the rights to be enforced are those which the defendant Bull could enforce, and no others, and, unless he call upon the defendant Hersee to pay the plaintiffs' claim in full, I do not perceive any ground upon which the plaintiffs can do so. In my judgment, the defendant Bull is not shewn to be entitled to that relief. It is plain upon the evidence, as I think, that the

defendants Bull and Hersee were dealing upon the footing of the plaintiffs being creditors who were willing to accept 40 cents in the dollar, and that when the instrument of the 2nd October was executed both were under the belief that, so far as the plaintiffs were concerned, the trust extended only to 40 cents in the dollar of their claim.

It was evidently not contemplated that the creditors who had intimated their acceptance of the composition, either by executing the deed or by letter to the defendant Bull, were to be paid in full by the defendant Hersee, in the event of their subsequently electing to treat their intimation as not binding, as they were at liberty to do provided the deed was not signed by all the creditors.

And the defendant Bull could not stretch the covenant or the trust so as to make them include more than 40 cents in the dollar of the claims of those whom he had represented as having agreed to accept that sum and treated as still willing to do so at the time when the instrument was executed. I do not think that, as regards any of claims which were so regarded by both parties, any Court would extend the trusts beyond the 40 cents in the dollar at the instance of the defendant Bull.

It follows that the plaintiffs are not entitled to the judgment which has been awarded them.

The appeal should be allowed and the action dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, J.A.:—The defendant Bull held the property of the debtors in trust for their creditors, including the plaintiffs, and he has sold the property to the defendant Hersee, the only consideration for the sale being the covenant sued upon. The plaintiffs having an undoubted right to the benefit of that covenant, and the defendant Bull having refused to enforce it, the right of plaintiffs to enforce it in their own name is as clear as anything can be.

The only question remaining is the construction and meaning of the covenant, and, to my mind, that admits of no doubt. The composition deed contained a proviso that it was only to become operative if assented to by all the creditors. Those who signed it first, therefore, signed it provisionally,

and, perhaps, could not withdraw until a reasonable time elapsed for the procurement of the signatures or the assent of the others, although that may not be so clear. However that may be, it never was assented to by all the creditors, and the assignee sold the property to the defendant Hersee, and as the consideration for the sale procured the covenant in question, which provides for the payment of both classes, both those who had accepted the composition and those who had not. It may be that plaintiffs could legally claim that they had not assented to the deed so as to be bound thereby, by reason of the condition referred to, and I incline to think they could, but it is proved, and is so found by the learned Judge, that before the sale they had notified the assignee that they repudiated it on the ground of misrepresentations whereby they had been induced to execute it, and that defendant Hersee was informed of that repudiation before he made his purchase. That being so, I think the plaintiffs are persons who had not accepted the composition within the meaning of the covenant, and whom Hersee covenanted with the assignee to pay in full in case no more favourable settlement could be made with them. . . . I think it is impossible, after the sale has been carried out and completed, to qualify the trust and the covenant by the recitals. I think the appeal ought to be dismissed.

Appeal allowed; MACLENNAN, J.A., dissenting.

MEREDITH, J.

OCTOBER 10TH, 1902.

CHAMBERS.

RE BRANDON v. GALLOWAY.

Prohibition—Division Court—Amount Involved—Action for Tort—Costs.

Motion by defendant for prohibition to the 10th Division Court in the county of York, on the ground that the amount claimed and adjudged to plaintiff, \$75, was beyond the Division Court jurisdiction, the action being one under the Workmen's Compensation Act to recover damages for injuries to plaintiff in defendant's factory by the alleged negligence of a fellow-servant.

John Greer, for defendant.

D. M. Defoe, for plaintiff.

MEREDITH, J.:—The plaintiff's claim in the Division Court was for damages for injuries sustained through the negligence of a fellow-servant of plaintiff, for which the defendant, the master, is said to be liable under the provisions of the Workmen's Compensation for Injuries Act. The claim was in respect of a wrong, and could not by any device be converted into one for breach of contract. The claim and judgment being beyond the jurisdiction of a Division Court, the defendant was entitled to prohibition. If the plaintiff sue and recover judgment upon his claim in a higher Court, he must then pay the costs of this motion or set them off against the judgment; otherwise no order as to such costs.

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OCTOBER 7TH, 1902.

DIVISIONAL COURT.

CROW'S NEST PASS COAL CO. v. BELL.

Label—Pleading—Defence—Fair Comment—Embarrassing Pleading—Particulars.

An appeal by plaintiffs from an order of BOYD, C., in Chambers, refusing an application by plaintiffs to strike out one of the defences in an action for libel.

G. G. S. Lindsey, K.C., for appellants.

A. E. Knox, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.:—This is an action for libel, the libellous matter complained of being an article referring to the appellants' operations, contained in a newspaper published or alleged to be published by the respondents.

One of the defences set up is that of fair comment.

The learned Chancellor, upon the application of the plaintiffs to strike out that defence, directed that the pleadings should be amended. The appellants are not satisfied, and have appealed from the order, contending that, even with the amendment which the learned Chancellor directed to be made, the defence is insufficient.

The article complained of contains a number of allegations of fact—statements of fact—and the paragraph of the statement of defence objected to does not attempt in any way either to give a statement of the facts upon which it is alleged the article was fair comment, or allege that the statements of fact in the article complained of were true.

We think the position of the appellants is right.

It is clear upon the authorities that a man may not invent his facts and comment upon them and succeed upon the ground that, the facts being assumed to be true, the comment is fair.

The matter has been the subject of discussion in a good many cases in this Province and Dominion and elsewhere.

In *Penrhyn v. Licensed Victuallers' Mirror*, 7 *Times L. R.* 1, the form of defence is given in which the defendant, who set up the defence of fair comment, where there were matters of fact alleged, stated that, so far as the article complained of contained statements of fact, those statements of fact were true, and as to the other matters that they were matters of fair comment; and that was held to be the proper form of pleading in such a case.

In *Martin v. Manitoba Free Press Co.*, 21 *S. C. R.* 518, *Brown v. Moyer*, 20 *A. R.* 509, and *Douglas v. Stephenson*, a decision of this division, 29 *O. R.* 616, 18 *Occ. N.* 339, afterwards affirmed by the Court of Appeal, 26 *A. R.* 26, 19 *Occ. N.* 60, this view of the law is recognized and acted upon.

It seems to us, therefore, that the order of the learned Chancellor did not go far enough, and that the pleading must be struck out, unless the respondents elect to amend, by either setting out a statement of the facts with regard to which they allege the article was a fair comment, or, in the other form, by justifying the statements of fact contained in the article, and as to the other matters pleading that they were fair comment upon those matters of fact.

Two forms of pleading this defence are given in *Odgers on Libel and Slander*, 3rd ed., numbers 29 and 30, pp. 672 and 673.

The form of pleading number 29 is that which was recognized as the correct pleading by a Divisional Court composed of Justices Mathew and Grantham in *Penrhyn v. Licensed Victuallers' Mirror*. The third paragraph, which is the material one, is as follows: "In so far as the said words consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinion, they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest."

The other form it is not necessary to refer to.

The respondents should have ten days in which to make their election and to amend.

The motion of the appellants also asked for particulars of the defence. We think it would be premature to determine anything as to that until the form of pleading is settled. It may be that the pleading may contain all the information that the respondents are required to give, and, therefore, we do not interfere with the order in that respect, but leave the appellants, if they are so advised, to make their application when the pleading is placed upon file.

The costs of the appeal will be to the appellants in any event.

FALCONBRIDGE, C.J.

OCTOBER 14TH, 1902.

TRIAL.

WATTS v. SALE.

Chattel Mortgage—Seizure under—Breach of Trust—Damages.

Action for damages for taking possession of a laundry business in the city of Windsor under a chattel mortgage, which the plaintiffs alleged was a breach of trust.

W. R. Riddell, K.C., and J. W. Hanna, Windsor, for plaintiffs.

A. B. Aylesworth, K.C., and J. E. O'Connor, Windsor, for defendant.

FALCONBRIDGE, C.J.:—I find all the issues of fact in favour of defendant. I find that defendant in making the seizure acted in good faith with the object of protecting the trust property and himself as trustee-mortgagee, and he is entitled to be recouped his expenses and to be paid proper compensation for his care and trouble.

I acceded somewhat hastily to the proposition that plaintiffs' damages should, in the event of their succeeding, form the subject of a reference. But it was quite manifest on the general evidence that plaintiffs have suffered (if any) damages of the least substantial that can be imagined.

Action dismissed with costs, including all costs over which I have any disposing power. Reference to determine amount of defendant's compensation and disbursements.

Thirty days' stay.

OCTOBER 14TH, 1902.

DIVISIONAL COURT.

MURPHY v. BRODIE.

Stay of Proceedings—Consolidation of Actions—Parties.

An appeal by plaintiff from an order of BRITTON, J., in Chambers, ante 429, varying an order of one of the local Judges at Sandwich which dismissed an application by defendant to stay proceedings in this action, or to consolidate it with the action of Stuart v. Brodie, in which the same issues were said to be involved.

F. A. Anglin, K.C., for plaintiff.

F. E. Hodgins, K.C., for defendant.

THE COURT (BOYD, C., STREET, J., MEREDITH, J.) varied the order appealed against by directing that this action

be consolidated with *Stuart v. Brodie*, with leave to all parties to amend; all parties agreeing to take the consolidated action down to trial at the next sittings. Costs in the cause.

BRITTON, J.

OCTOBER 15TH, 1902.

CHAMBERS.

CALDWELL v. BUCHANAN.

Libel—Pleading—Defence—Stating Facts and Circumstances—Embarrassment.

Appeal by defendant from order of local Judge at Perth striking out paragraph 3 of the statement of defence in an action for libel by a member of the congregation of St. Andrew's Presbyterian church in the village of Lanark against the minister of that church. The alleged libel stated that the plaintiff had accepted a deficient certificate of membership in irregular form. The 3rd paragraph of the defence stated at great length the facts and circumstances under which the defendant wrote the alleged libel, and concluded as follows: "The defendant's attention was called to the said article (an article in another newspaper) by members of his congregation, and it was urged that the false impression thereby conveyed should be corrected, and the defendant thereupon wrote and forwarded to such papers as had a circulation in the said counties what he believed to be a fair and impartial statement of the result of such proceedings, which said statement is the article or articles complained of."

J. H. Moss, for defendant.

Grayson Smith, for plaintiff.

BRITTON, J.:—I shall not interfere with the discretion which the local Judge exercised in striking out this paragraph and allowing defendant to amend as he may be advised. The application was made under Rule 298, not under Rule 261, and the only question is, whether this paragraph embarrasses plaintiff or is calculated to do so in the trial of the real issue between the parties. An embarrassing plea is one in which matter is pleaded that the defendant is not entitled to make use of. No doubt a good deal of liberty is allowed in case of libel, where defendant may set out all the facts relied on as shewing justification or privilege or in mitigation of damages, but it is not clear what paragraph 3 is intended to be. It may mean that the impression created by the certificate of membership which the plaintiff had obtained was a false impression, and that the defendant was justified in an attempt to correct that impression in the mind of the

public by publishing what is complained of. If that is the meaning, it is embarrassing. If that is not its meaning, the latter part of the paragraph is embarrassing in not being so framed as to shew clearly what defendant intends to rely upon. Appeal dismissed. Costs in cause to plaintiff.

OCTOBER 15TH, 1902.

DIVISIONAL COURT.

RE SCADDING.

Will—Legacy—Interest on — Legatee Attaining Majority — Death of Widow—Mixed Fund.

Appeal by executors from order of MACMAHON, J., in Chambers (ante 467), declaring that executors should pay out of the estate interest upon legacies from the dates of the legatees attaining majority.

The appeal was heard by BOYD, C., STREET, J., MEREDITH, J.

C. A. Masten, for executors.

W. Bell, Hamilton, for legatees.

BOYD, C.:—The scheme of the will is to create a trust fund of the whole estate, real and personal, to be held by the trustees and executors to pay first of all an annuity of \$800, and then to pay all the balance of the income to the widow for life, and on her death to divide the corpus: to the two grandchildren \$1,000 each, and then an equal division among the testator's children. The bequest of these two legacies is declared to be subject to the widow's life interest; the legacies are to be paid when the grandchildren attain 21, but in case the estate is divided (i.e., upon the death of the widow) before they attain 21, then interest is to be paid on the legacies; if the grandchildren die before attaining 21, the legacy falls into the estate. The meaning of this clause is, that the legacies are made contingent upon the beneficiaries coming of age, when they become vested, but the time of payment is postponed till the widow dies. They have attained 21, and the widow did not die till some years thereafter. The payment of interest on legacies depends upon certain rules which are modified by the intentions of the testator, as expressly or impliedly declared by the language of the will. This will is not silent as to interest; it contemplates and provides for the payment of interest on the legacies after the time fixed for dividing the estate, if the legatees are not then of age. That indicates that interest is not meant to be given before the time arrives for dividing the estate. It is a general rule

that interest is not payable on a legacy, whether vested or not, until it is actually due and payable. Interest is given for delay in payment. The testator here has in effect declared that these legacies are not to be paid until the death of the widow. If that falls after the beneficiaries attain 21, it does not follow that interest should be given in the interval; for the time has not arrived which the testator has fixed for payment, and there is no default. Interest is not to be exacted when by the direction of the testator there is nothing in hand to pay the legacy. *Toomey v. Tracey*, 4 O. R. 708, distinguished. Therefore, the appeal should be allowed and it should be declared that interest on the legacies runs only from the death of the widow. See *Crickett v. Dolby*, 3 Ves. 16. Order accordingly. Costs out of the estate.

STREET, J., concurred.

MEREDITH, J.:—The meaning of the will is, that, in the events which have happened, the legacies in question became payable at the widow's death, not upon the legatees respectively attaining full age.

The scheme of the testator, as developed in his will, was that the estate should remain intact until his wife's death, so that she might have the benefit of the whole income from it; and that at her death the legacies in question should go to these grandchildren, to be paid to them as they attained majority, and all were put upon an equality by the express provision that interest should be paid to those whose payments should be deferred by reason of their minority.

The fact that one of the legatees attained full age in the testator's lifetime goes to confirm this reading of the will.

WINCHESTER, MASTER.

OCTOBER 17TH, 1902.

CHAMBERS.

HARRIS v. HARRIS.

Pleading—Statement of Claim—Statements of Unnecessary Facts and of Evidence—Embarrassment—Pleading to Claim—Waiver.

Motion by defendant Elizabeth Harris to strike out certain paragraphs of the statement of claim. The plaintiff, claiming to be the lawful widow of the late Hebron Harris, brought this action against Elizabeth Harris, who also claimed to be the widow of Hebron Harris, and the executors of his will, for a declaration that plaintiff was the lawful wife and is the lawful widow of the deceased. The paragraphs of the statement of claim objected to referred to a certain action in the High Court, in which the defendants the executors were plaintiffs and the two sons of the plaintiff were defendants, brought to

have probate of the will of Hebron Harris decreed, and stated the proceedings in that action, and that an appeal thereon was still pending in the Court of Appeal. The defendant Elizabeth Harris filed a statement of defence, and at the same time served notice of this motion.

D. L. McCarthy, for applicant.

H. M. Mowat, K.C., for plaintiff, contended that, by delivering a statement of defence, defendant waived the right to object to the statement of claim, and shewed that there was no embarrassment.

THE MASTER:—In my opinion, the defendant did not waive her right to object to the plaintiff's statement of claim, as she served her notice of motion with the statement of defence. The paragraphs complained of are improperly pleaded under Rule 268, as being statements of unnecessary facts and of evidence. Order made striking out paragraphs 6, 7, 8, and 10, with leave to plaintiff to amend. Costs to applicant in any event.

MACMAHON, J.

OCTOBER 18TH, 1902.

TRIAL.

MCGARRIGLE v. SIMPSON.

Will—Testamentary Capacity—Senile Dementia—Insane Delusions—Comprehension of Terms of Will—Attack on Will by Person having Accepted Benefit under it—Costs.

Action for a declaration that a certain instrument in writing executed by Cornelius McGarrigle, deceased, on the 1st December, 1899, was not his last will and testament, on the ground that he was not of testamentary capacity at that date. The testator was at this time more than seventy years of age. He could neither read nor write. He had partly lost his memory, and was considered by his employer, who was a physician, to be in an advanced stage of senile dementia. On the 1st December, 1888, he had made a will leaving all his property among his brothers and sisters. The will in question made almost the same disposition of his property, the only substantial difference being in the bequest to his brother John, which was under the first will \$4,000 and under the last will \$2,000. He was declared a lunatic on the 19th February, 1900, and died in an asylum on the 31st August, 1900.

C. H. Ritchie, K.C., and J. Baird, for plaintiff and defendants Mowat and Davey.

A. J. Armstrong, Cobourg, for defendant Simpson.

H. F. Holland, Cobourg, for defendant McGee.

W. R. Riddell, K.C., for the other defendants.

MACMAHON, J. (after reviewing the evidence) referred to the following cases: *Waring v. Waring*, 4 Moo. P. C. 351; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Jenkins v. Morris*, 14 Ch. D. 674, 42 L. T. N. S. 817; *Den v. Vancleve*, 2 Southard (5 N. J.) 589; *Stevens v. Vancleve*, 4 Wash. (U. S. C. C.) 267; *Greenwood v. Greenwood*, 3 Curt. Appx. xxx; *Boughton v. Knight*, 3 P. & D. 64; *Smee v. Smee*, 5 P. D. 84; *Murfitt v. Smith*, 12 P. D. 116; *Roe v. Nix*, [1893] F. 55, 9 Times L. R. 128: and concluded:—

McGarrigle, no doubt, had an imperfect memory; he could not recollect where the furnace was while at Dr. Hilliar's; he forgot that Dr. Hilliar had paid him the principal and interest due on the VanCamp mortgage; he could not remember that the amount of the mortgage had been deposited to his credit in the Standard Bank, and asked foolish questions about it; and he forgot the amount appearing to his credit in the bank pass book. On the 28th December, 1899, in conversation with Mr. Tole, he spoke about his loss suffered in the Skinner property, the fact being that he had sold it and received the purchase money; and, although he had made his will and divided his property, he spoke of his intention to do so if he had forgotten the making of the will. And on the following day, on going to the Dillings' house, he wanted to sleep on a shelf in the pantry, and shortly afterwards he spoke of the chickens as colts and sheep, and wanted them shod.

These and other circumstances shew that he was possessed of delusions on some subjects. But the making of the impeached will was an act of his own volition. He had for some time contemplated making a new will, and had spoken to Mr. Simpson (his solicitor and executor) on several occasions of his intention to make a will; and from what transpired in Mr. Simpson's office on the 1st December, 1899, McGarrigle came there having in his mind the making of a will, and having a full knowledge and recollection of the amount of the property he possessed, and having also in his mind the manner in which it should be divided, and who he intended should take as beneficiaries under the will.

From the evidence . . . no matter what latent delusions existed in the testator's mind, they had no influence on the disposal of his property, for it is almost the same disposition that was made under the will of 1888, when no delusions affected his mind. . . .

There will be judgment for defendants declaring that the testator was at the time of the making of the will of 1st December, 1899, of sound mind, memory, and understanding, and that the said will is his last will and testament.

In this case I should have followed the rule laid down in *Davies v. Gregory*, 3 P. & D. 28, *Roe v. Nix*, [1893] P. 57, *Brown v. Penn*, 12 Times L. R. 46, and *Browning v. Mostyn*, 13 Times L. R. 184, and granted the plaintiff his costs out of the estate, but for his acceptance of a payment of \$1,500 under the will which he afterwards impeached, and his execution of a release under seal in which the terms of the will are recited. He is thereby estopped from contesting the validity of the will. He said, at the time he received the \$1,500 on account of the bequest to him, that it was better to take the money than go to law.

The costs of all parties except the plaintiff will be paid out of the estate.

OCTOBER 18TH, 1902.

C. A.

LEEDER v. TORONTO BISCUIT CO.

Master and Servant—Injury to Servant in Factory—Elevator—Defects—Safeguards—Signals—Negligence—Findings of Jury.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of the jury in an action for damages for injuries sustained by plaintiff, while in the employment of defendants, by their alleged negligence. Plaintiff fell down an elevator shaft not provided with self-closing gates. There was no person in charge of the elevator. The workmen used it when necessary. The plaintiff had been using it, and, supposing it was still at hand, whereas it had been withdrawn by others, stepped into the shaft, and was injured. The jury found that the factory inspector was asked by defendants if the safeguards of the elevator were sufficient, and said they were; that the defect in the hoisting apparatus consisted in the want of a proper signal and of a self-acting guard; and that the accident was due to defendants' negligence.

W. R. Riddell, K.C., and R. H. Greer, for appellants, contended that, on the evidence, plaintiff was negligent in backing towards the shaft without looking, and that, on the finding of the jury as to the factory inspector, they were entitled to judgment.

F. Denton, K.C., and A. D. Crooks, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

OSLER, J.A.:—The jury found that there were two defects in the condition or arrangement of the hoisting apparatus . . . These defects are quite independent of each

other. If it were necessary to rest the case upon the last, much might be said for defendants' contention that they were not obliged to provide any safeguards to the elevator itself beyond that which the factory inspector had approved of as sufficient, after inspection and examination of it. When that safeguard was applied, it was of course sufficient, consisting as it did of doors or gates intended when closed to be fastened with a latch, and in that condition would necessarily prevent any one from falling into the elevator opening, or passing into the elevator until opened again for the purpose of being used. The doors did not shut automatically, and it was contended that some additional device should have been employed, such as automatic bars, which would have guarded the opening in case the doors were temporarily left open, either by neglect or because the elevator was to be immediately re-entered by the person who had just used it. It had not occurred to the inspector that any additional safeguard of this kind was required, and he thought that with ordinary care it was safe enough.

In the view we take of the case, it is not necessary to decide whether compliance with the directions of the inspector under the Factories Act is sufficient to absolve defendants from negligence which they might otherwise be open to have imputed to them under the provisions of the Workmen's Compensation Act, in respect to the absence or insufficiency of a guard, because the other ground on which the jury found against defendants arises out of the manner in which the elevator was used in the factory, which created a danger against which the safeguard approved by the inspector was not intended to, and did not, provide. . . . The only way in which notice would be given of the withdrawal or sending up of the elevator . . . was the rattling or shaking of the hoisting rope; no other signal or warning was provided for. The jury might well have come to the conclusion . . . that the arrangement of the whole apparatus was defective in the absence of some better provision for signalling its movements to those who had been using it and were immediately about to use it again. The findings of the jury absolve the plaintiff of negligence, and if he was not aware that the elevator had been hauled down, such a result cannot be said to be wrong. It cannot be ruled as a matter of law that plaintiff was negligent in not having shut the doors when he stepped out of the elevator or in not having looked behind him. . . .

Appeal dismissed with costs.

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OCTOBER 18TH, 1902.

DIVISIONAL COURT.

CHAMBERS v. McCOMBS.

Mortgage—Mortgagee in Possession—Statute of Limitations—Payment by Rents and Profits—Account—Reference.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiff in ejectment. Plaintiff, as mortgagee, went into possession of certain land, chiefly pasture, but with a small house upon it, in 1871, and had the rents and profits of it. He removed the house, and, there being no one on the premises, the defendant, who acquired the interest of the mortgagor, in 1901, went into possession, and the plaintiff brought this action.

G. Lynch-Staunton, K.C., for defendant, contended that the plaintiff's claim had been paid off by the rents and profits and the removal of the house, and that that was such a payment as stopped the running of the Statute of Limitations, the plaintiff having then gone out of possession. He urged that an account should be taken to shew whether plaintiff's claim had been paid.

S. H. Bradford, for plaintiff, contra.

The judgment of the Court (BOYD, C., MOSS, J.A.) was delivered by

BOYD, C.:—The issues raised by the pleadings and which appear to be necessary to make a final determination of this case, have not been elucidated by evidence, nor are they dealt with in the judgment. The judgment is merely for possession, and, though that is in accord with the outstanding legal title, that legal title may not be of importance if the defendant can establish his defence as to the payment of the mortgage and the non-possession of plaintiff thereafter. The prosecution of the case at the hearing was intercepted by the hypothetical cases put by counsel, and we do not know what the real facts are. To save the expenses of a re-trial it is better to let the judgment stand for possession to plaintiff, subject to the report of the Master and judgment thereon

upon further directions. Let it be referred to the Master to investigate and report upon the truth of the defence and report specially as to taxes, etc. Further directions and costs reserved. The defendant should as a condition of this relief pay into Court or give security for \$100, to be dealt with by the Court after the conclusion of the case. If this condition is complied with in 14 days, order as above. If not, appeal dismissed with costs.

OCTOBER 22ND, 1902.

DIVISIONAL COURT.

RE RITZ AND VILLAGE OF NEW HAMBURG.

Parties—Summary Application to Quash Municipal By-law—Countermand—Motion to Add or Substitute New Applicant.

Appeal by John F. Katzenmeier from order of MACMAHON, J., in Chambers (*ante* 574), dismissing application for an order allowing appellant to be added as an applicant for a summary order quashing by-law 259 of the village of New Hamburg, or substituting him for Charles Ritz, the original applicant, who had countermanded his notice of motion for the order. When the countermand was served, the time for applying to quash had expired.

New material was allowed to be used upon the appeal, which was heard by BOYD, C., STREET, J., MEREDITH, J.

E. E. A. DuVernet, for Katzenmeier.

A. B. Aylesworth, K.C., for the corporation.

BOYD, C.:—The analogy of proceedings in an action applies to these applications to quash by-laws: *Re Sweetman and Townships of Gosfield*, 13 P. R. 293, approved of by the Court of Appeal in *Re Shaw and City of St. Thomas*, 18 P. R. 454.

When the fact is that the motion to quash is taken on behalf of a number of interested ratepayers who have combined to make the necessary deposit to answer costs, it is as a matter of course to allow any amendment of the papers so as to place that fact on record: In *re Tottenham*, [1896] 1 Ch. 628. And if it be the fact that the motion is in truth on behalf of a number so interested, the failure of the individual put forward to give a title to the proceedings to prosecute, or his attempt to relinquish the proceedings, should not prejudice the others who seek to have the matter adjudicated. In such a case the practice of the Court is to substitute another, being one of those really interested: *Hughes v. Pump House Co.*, [1902] 2 K. B. 485.

The persons interested who contributed the money relied upon their nominee, Ritz, duly prosecuting the motion intrusted to him, and if he betrays that trust, the Court seized of the motion is not helpless to do justice in the premises.

True, in a creditor's suit the creditor who files a bill may before decree dismiss it and another creditor is not allowed to intervene, because he does not rely on the diligence of the acting creditor, and it is open for him to begin proceedings in his own name. But the points of difference here are plain: because it is too late to initiate another motion on account of the three months' limit; and because all the contributories relied upon Ritz acting promptly and uprightly (see *Handford v. Storie*, 2 Sim. & Stu. at p. 198, *Canadian Bank of Commerce v. Tinning*, 15 P. R. 401, *Atlas Bank v. Mahat*, 23 Pick. 492); and because those thus defrauded have made actual contribution to the expenses of the litigation.

[*Macdonald v. City of Toronto*, 18 P. R. 17, referred to.]

* * * * *

The Court should grant the relief asked. . . . The terms will be as stated by my brother Meredith.

MEREDITH, J.:—The application was made at the instance and upon the behalf of nine ratepayers. Ritz was but one of them, and, with his concurrence, his name only was used in the proceedings. Some time afterwards he was bribed to discontinue them, and desired to do so, and has done all he was asked to do, by those who bribed him, to carry out his corrupt bargain; but the application was still pending when the order appealed against was made.

In these circumstances the Court is not powerless to prevent the bribed defeat of the ratepayers' right to apply to quash the by-law. Ritz, as their agent, could be restrained from such a breach of confidence and trust. A simple and ready injunction is the order proposed: see *Payne v. Roger*, Doug. 407; *Leigh v. Hunt*, 1 B. & P. 447; *Doe v. Franklin*, 7 Taunt. 9; *Hicks v. Beith*, 7 Taunt. 48; *Morell v. Newman*, 4 B. & Ad. 419. They may, and ought to be, empowered to continue the proceedings in Ritz's name, on the usual terms of indemnifying him against costs. They should also undertake to speed the hearing of the application, and should, at the end of the litigation, pay the respondents' costs of the motion below and of the appeal, which, by reason of the new material used, put it, for the purpose and in the circumstances of the case, in the same position as an original motion.

STREET, J.:—I concur.

OCTOBER 22ND, 1902.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v.
STANLEY.

Execution—Judge's Order for Costs—Direction for Set-off—Service of Allocatur—Issue of Execution—Production of Original Order or Office Copy.

Appeal by defendant from order of LOUNT, J., dismissing defendant's application to set aside a writ of *fi. fa.* against defendant's goods for interlocutory costs under a Judge's order, upon grounds of irregularity appearing below.

The appeal was heard by BOYD, C., STREET, J., MEREDITH, J.

W. H. Bartram, London, for defendant.

D. W. Saunders, for plaintiffs.

BOYD, C.:—Strict practice requires that when execution is issued upon a Judge's order, the order itself or an office copy thereof should be produced to the officer, unless that officer has official custody of the books of the Court wherein the order has been entered. In such case he may act upon the copy of the order served, after verifying its correctness by reference to the record in his custody. Where the officers are distant, *i.e.*, one officer issues the order and another issues the execution, then proper evidence of the existence and contents of the order should be laid before the officer who issues process. It is customary in the central office at Osgoode Hall, where all the officers are together, that one should refer to the other, and a copy of an order served may be acted upon when the officer has the means at hand of verifying its correctness. So in the Weekly Court at London, where an order is issued and entered by the clerk at the weekly sittings, it is competent for the auxiliary officer who issues execution thereon, *i.e.*, the deputy registrar, who is in easy touch with the other officer, to satisfy himself that the copy served is accurate. In the absence of evidence and in face of the fact that it is not disputed that the copy is right, the Court on this motion will infer that *omnia rite esse acta*.

I think that the appellant has a right to complain in strictness that deduction was not made from the costs last taxed against him, if the company's solicitor intended to issue execution therefor, and for this reason I would agree with the result arrived at by my brother Meredith.

STREET, J.:—I concur.

MEREDITH, J.:—The appellant seeks to set aside the *fi. fa.* on these grounds: 1, because costs directed to be set off were not deducted before the writ issued; 2, because the certificate of taxation was not served; and 3, because, as to part of the costs included in the writ, it was issued without production of the original order for payment of such costs.

As to the first ground, the direction was a verbal one, made by the learned Judge who made the order now in appeal, so that it must have been considered by him that his verbal direction had been substantially carried out, and so it now appears. The costs have been set off against an earlier bill of the plaintiffs, upon which execution had issued. The only possible loss the defendant could sustain by setting his costs off against the plaintiffs' earlier instead of his later bill is the sheriff's poundage on \$12, that is, 72 cents, and in the disposition to be made of this motion that will be prevented.

As to the second ground, there is no practice requiring service of the allocatur in such case as this. The defendant's solicitor had notice of the taxation, and his agents were present when it was completed, so that the defendant had notice of the amount payable, and the writ was not issued until five days afterwards: see Con. Rule 843. It would have been more courteous and commendable to have asked for payment before issuing the writ; the amount was small, for interlocutory costs only, and the solicitors resided in the same town, and after the previous like taxation a copy of the allocatur had been served; though, to the contrary, it is right to add that such service had no effect, the costs were not paid, the Court had to be moved to recover them.

The last ground seems more important as a matter of general practice. It can hardly be good practice to issue execution upon what at most merely purports to be a copy of an order; and, in this case, there was no reason why the original or an office copy could not readily have been obtained. Our Rules seem to contain no provision touching the question; they are quite bald as to the *modus operandi* in obtaining the writ; they indicate from which office such writs shall issue, and provide for the filing of a *præcipe*, but that seems to be all. The English Rules expressly require the production of the original order or of an office copy of it: O. 42, r. 11: and such has long been the practice there, a rule of 1853 providing that no writ of execution should be issued until the judgment paper, *postea*, or inquisition, as the case might be, had been seen by the proper officer: R. 71, H. T. 1853. This is a reasonable and convenient practice which ought to be followed—as I think it has been—in this Court. It might be different if the order were entered in a book accessible to,

and examined by, the officer issuing the writ, before issuing it. But the defendant has not suffered from the irregularity; the order existed, and an office copy of it could have been had.

In these circumstances, the proper order to be now made, is that, upon the defendant paying to the plaintiffs or the sheriff, within five days, the amount due upon the two later bills of costs, that is, the balance now payable for interlocutory costs, all proceedings upon the writ be stayed. No costs of this appeal or the motion below; in default, the appeal to be dismissed with costs.

WINCHESTER, MASTER.

OCTOBER 23RD, 1902.

CHAMBERS.

RE PINKNEY.

*Security for Costs—Petition by Parents for Custody of Infant—
Petitioners out of Jurisdiction—Respondents Admitting Rights
of Petitioners.*

An application by the respondents to a petition for the custody of an infant for an order requiring the petitioners to give security for the respondents' costs of the petition.

Shirley Denison, for respondents.

W. E. Middleton, for petitioners.

THE MASTER.—The parents of Leland Pinkney have filed and served a petition seeking the delivery up by Mr. and Mrs. Corbett of Leland Pinkney, a boy about 14 years of age. The petitioners reside outside of the jurisdiction of this Court, and an application is now made by the respondents for an order for security for costs.

On the argument counsel for the respondents admitted that they were quite willing to deliver up the boy, but alleged that he refused to leave them. If this be so, then they have no objection to the Court awarding the custody of the child to his parents. The only difficulty apparently in the way is that the petitioners are asking to be paid the costs of the petition by the respondents. That is a matter that the Court has jurisdiction over, and is no reason why an order for security for costs should be granted when the subject matter of the petition must be handed over to the petitioners, as admitted by the respondents. In my opinion no order for security for costs should be granted. Costs in the petition to the petitioners.

WINCHESTER, MASTER.

OCTOBER 23RD, 1902.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. HICKEY.*Third Parties—Action to Set aside Tax Sale—Claim by Purchaser to Relief over against Municipality.*

Motion by the corporation of the town of Toronto Junction to set aside an order making them third parties herein.

The action was brought, to set aside a tax sale, against a person who had obtained a conveyance from the mayor and treasurer of the applicants under such sale.

The defendant claimed that she was entitled to some relief over against the corporation by virtue of the deed of conveyance.

W. E. Raney, for the third parties.

H. F. Gooderham, for defendant.

F. J. Dunbar, for plaintiff.

THE MASTER.—The deed does not purport to bind the corporation, and, besides, the statute provides for the relief to which a tax purchaser is entitled. I am, therefore, of opinion that the third party notice must be set aside.

The plaintiff was unnecessarily served with notice of this application. There will be no costs to the plaintiff. The third party will be entitled to the costs of this application, to be paid by the defendant forthwith.

BOYD, C.

OCTOBER 23RD, 1902.

TRIAL.

GRAND TRUNK R. W. CO. v. VALLIEAR.*Way—Private Way—Easement—Prescription—Railway Lands—User not Incompatible with Requirements of Railway.*

Action for damages for forcible removal and destruction of plaintiffs' fence by defendant, and for destruction of other property of plaintiffs, and for an injunction. Counterclaim for damages for removal of defendant's gate and interference with right of way.

Wallace Nesbitt, K.C., for plaintiffs.

S. W. McKeown, for defendant.

BOYD, C.:—The facts in this case are all one way. The defendant has used openly, continuously, and without interruption, for over 30 years, a foot-path, well defined, from the rear of his lot to the common, public roadway opening on the station grounds. The entrance to the station yard is protected by a gate which is frequently kept locked at night, and

the user of the defendant has been subject to this restriction. The defendant made the entrance from his land wider some eight or ten years ago, but, as against the company, the length of user of that additional width of way cannot be upheld.

The company's contention was of law, and was placed on the footing that a railway company have not power to dedicate part of their property, as that would be repugnant to the title by which they hold their lands. And, by parity of reason, that no presumption of grant could arise from length of user to support an easement, and therefore no right of way has been established as a matter of law. That doctrine, though it has some colour from expressions in *Guthrie v. Canadian Pacific R. W. Co.*, 27 A. R. 64, 31 S. C. R. 155, is not regarded as law by many great authorities by which I am bound. There is a line of cases beginning with *Regina v. Leake*, 5 B. & Ad. 478, down to the present time, which establish that railway lands may be dedicated for public or other user so long as that user is not incompatible with the present and actual requirements of the railway. Such is indubitably the case here, inasmuch as for over 30 years the defendant's use of the path has in no way harmed the company, and has not called forth the slightest complaint until this action is brought. . . . This path is a matter of no small importance to defendant, as it is in fact his only means of outlet. I think he is entitled to be undisturbed in his use of the path as aforetime, *i.e.*, of its original width as a footpath for pedestrians, subject to the right of the company to keep their gates closed and locked as before and so long as the station is in its present condition.

[*Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273, 276, *Re Gonty and Manchester, etc.*, R. W. Co., [1896] 2 Q. B. 439, *Foster v. London, Chatham, and Dover R. W. Co.*, [1895] 1 Q. B. 711, *Wells v. Northern R. W. Co.*, 14 O. R. 594, *Mulliner v. Midland R. W. Co.*, 11 Ch. D. 611, *Rangeley v. Midland R. W. Co.*, L. R. 3 Ch. 306, 310, *Elliott on Railroads*, sec. 1140, *Lehigh Valley R. R. Co. v. McFarlane*, 43 N. J. L. 605, and *Turner v. Fitchley*, 145 Mass. 438, referred to.]

The company interfered with and caused injury to defendant's gate, and should pay \$10 damages on the counterclaim. Action dismissed with costs and costs of counterclaim to be paid to defendant.

Moss, J.A.

OCTOBER 23RD, 1902.

C. A.—CHAMBERS.

OTTAWA GAS CO. v. CITY OF OTTAWA.

Leave to Appeal—Question of Costs—Right to Costs against Opposite Party—No Liability to Solicitor—Corporation Solicitor Paid by Salary—Change in By-law—Statute—Conflict of Decisions.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court (ante 647) reversing an order in Chambers upon a question of taxation of costs.

J. H. Moss, for defendants.

H. T. Beck, for plaintiffs.

Moss, J.A.—As the case stands at present, the defendants have been held not entitled to include in the costs taxable against the plaintiffs, any profit costs. The action was finally dismissed with costs on the 14th September, 1901. On that date the solicitor who conducted the defence, and acted throughout the action for the defendants, was under engagement by them at a yearly salary of \$2,500, in consideration of which he was to perform the duties specified in the by-laws regulating and defining the duties of city solicitor. One term of the by-law was, that all costs awarded to the corporation in any suit should be paid to the city treasurer, and a detailed statement thereof rendered in May and December of each year.

On the 10th July, 1902, the by-law was amended so as to provide that all costs payable to the corporation in any suit should be paid to the city solicitor as part of his remuneration in addition to his salary.

On the 23rd July, 1902, the defendants brought in their bill of costs in this action for taxation by the deputy registrar, who, on the production by the plaintiffs of the before mentioned by-laws, ruled that the defendants were not entitled to tax profit costs. Upon appeal from this ruling Street, J., held that the defendants were entitled to the benefit of the amendment of the by-law, which brought the case within the provisions of sec. 320 (3) of the Municipal Act.

The Divisional Court was of the contrary opinion, and also held that upon the terms of the by-law prior to the amendment the case was governed by *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson v. City of Kingston*, 31 C. P. 333.

The defendants relied upon *Galloway v. Corporation of London*, L. R. 4 Eq. 90, and *Henderson v. Merthyr Tydfil*, [1900] 1 Q. B. 434.

On this motion it was submitted that these cases laid down a rule not in conflict with our own cases, which might be adopted without impinging upon them. It was said that, conceding the correctness of the doctrine that inasmuch as the salary covered all claims of the solicitor against the clients for the costs of conducting the defences, the clients incurred no liability against which they were entitled to be indemnified, it had no application where, as in this case, it was a term of the employment that the costs awarded to the corporation should be received by the city treasurer for its benefit. It was further submitted that if it appeared that *Jarvis v. Great Western R. W. Co.* and *Stevenson v. City of Kingston* applied, they should be reconsidered in the light of the English cases; and that in any case the question of the effect of the amendment to the by-law was of sufficient importance to justify further discussion in this Court.

Jarvis v. Great Western R. W. Co. was decided over 40 years ago. It was fully considered in *Stevenson v. City of Kingston* over 20 years ago, and was then affirmed, though the opinion of Sir A. Wilson, C.J., was opposed to it. At the next session of the Legislature held after the rendering of the latter decision, the Municipal Act was amended (44 Vict. ch. 24, sec. 5) so as to enable a municipal corporation to collect costs of suits and proceedings, notwithstanding the employment of the solicitor at a salary, when by the terms of the employment such costs are payable to the solicitor as part of his remuneration in addition to his salary. From that time to the present it has been within the power of the defendants in this action to do as they have lately done, viz., make it a term of the employment of their solicitor that costs payable to them by other parties should be received by the solicitor as part of his remuneration in addition to his salary.

Without saying that a case could not yet arise in which it might be proper to review these cases, I think that, having regard to the legislation, and to the prior decisions and the clear recognition of their authority in subsequent cases, I ought not to give leave to open a discussion of them with a view to the adoption of the rule of the English cases, at the instance of a municipal corporation. The amount involved is not large, and the defendants have provided for all future cases. I am inclined to agree with the Divisional Court that the date of the judgment governs the plaintiffs' liability to the defendants for costs, but I express no decided opinion. I only say that I think no sufficient reasons have been shewn for treating the case as exceptional and allowing a further appeal.

The motion must be dismissed.

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STREET, J.

OCTOBER 24TH, 1902.

CHAMBERS.

DUNLOP PNEUMATIC TIRE CO. v. RYCKMAN.

*Pleading—Counterclaim—Exclusion of—Defendants to Counterclaim
out of Jurisdiction—Foreign Trade Mark, Subject of Counterclaim
—Hardship—Injustice.*

Appeal by plaintiffs and Palmer, one of the defendants to the counterclaim, from an order of the Master in Chambers refusing their application to strike out the counterclaim of the defendants the Dunlop Tire Company, referred to as "the Canadian company." The plaintiffs are referred to as "the English company."

W. M. Douglas, K.C., for the appellants.

W. E. Middleton, for the counterclaiming defendants.

STREET, J. (after setting out the facts at length) :—The action is brought by the English company to restrain the defendants from exporting pneumatic tires from this continent and competing with the plaintiffs in their business in other parts of the world, contrary to the terms of the agreement of 13th December, 1898, which the plaintiffs say is binding upon all the defendants.

The defendants the Canadian company deny that the agreement is binding upon them, but say that, if it is, it does not represent the real bargain which was made between the plaintiffs and Ryckman, and they claim a rectification of it. They further say that the plaintiffs did not deliver the whole of the rights of the American company, as they agreed to do in the agreement, and that the Canadian company has been obliged to pay large sums to obtain those rights, and they ask that the plaintiffs be ordered to repay these sums and the damages they have been put to in consequence. They further ask for a declaration of their rights under certain parts of the agreement. All these claims are put in the form of a counterclaim by the Canadian company against the plaintiffs alone, and, in my opinion, they are very proper subjects for a counterclaim in this action.

The remainder of their counterclaim is, however, of a much wider character. It alleges that under the proper construction of the agreement of 13th December, 1898, the Canadian company is entitled to the use of certain trade marks in connection with tires exported by them to countries outside America; but that the plaintiffs, along with two persons, Garland and Palmer, and an Australian company, none of whom is a party to the action, have fraudulently and with knowledge of the rights of the Canadian company conspired together to cheat them of their rights by registering the said trade marks in the name of the Australian company, and they ask for an injunction and damages against Palmer, Garland, the Australian company, and the plaintiffs.

The complaint of the Canadian company in this part of the counterclaim is that the defendants to the counterclaim, by certain acts done in Australia, have interfered with their trade there. Of the defendants to the counterclaim Palmer is the only one within the jurisdiction of the Court: Garland lives in Australia, and the Australian company has its head office there. The plaintiffs in this action, who are the remaining defendants to the counterclaim, have their head office in England, and have neither business nor offices in Ontario. None of the parties defendants to the counterclaim, except the defendant Palmer, has pleaded to it or admitted the jurisdiction of the Court.

I think an examination of the pleadings and of the issues sought to be raised by the counterclaim against the new parties is sufficient to establish the injustice to the plaintiffs of allowing the question of the Australian trade mark to be raised and disposed of in the present action. It is manifest that great delay must necessarily be encountered in taking the evidence, which must be taken in Australia as well as in England, in disposing of the question of the trade marks. In the meantime the defendants the Canadian company have everything to gain and nothing to lose by the delay, for they will, of course, continue to carry on the foreign business which the plaintiffs seek in the action to restrain. I can see no such intimate connection between the subject of the action and the subject of the counterclaim as to oblige the Court to require both to be disposed of in the same action. I can see that to allow the counterclaim would operate as so great a hardship upon the plaintiffs as to amount almost, if not entirely, to an actual denial of justice to them, and I am, therefore, of opinion that the appeal should be allowed as to that portion of the counterclaim which begins with the 16th paragraph of the defence and counterclaim, and relates to the

claim against the plaintiffs, Garland, Palmer, and the Australian company in respect of the trade mark, and that this portion of the counterclaim should be excluded, with the right, of course, to the Canadian company to make it the subject of a separate action, if so advised.

The remainder of the counterclaim was not objected to, and should stand, and the defendants the Dunlop Tire Company, Limited (called herein "the Canadian company"), should pay the costs of the application and appeal.

OCTOBER 27TH, 1902.

DIVISIONAL COURT.

ABBOTT v. ATLANTIC REFINING CO.

Principal and Agent—Undisclosed Principal—Action by Agent—Breach of Contract—Construction of Roof—Guarantee—Representation as to Ownership—Addition of Principal as Party—Recovery—Damages.

Appeal by defendants from judgment of County Court of Simcoe in favour of plaintiffs in an action originally brought by George A. Abbott alone upon a guarantee by defendants that a roof completed by them upon a new building belonging to Mary S. Abbott, wife of George A. Abbott, would remain waterproof for five years, and an agreement that in case of its leakage within that time they would repair it at their own expense. Mary S. Abbott was afterwards added as plaintiff. She was erecting the building in question upon her own land for herself; her husband was acting as her agent in making the contracts for its erection, and superintending the work done on her behalf, but had no personal interest in it. The defendants became aware that a roof was to be put on, and wrote the husband that in order to introduce their roofing material into "your town" they would put on "your roof" for a fixed price. To this he replied in his own name accepting their offer to put on "my roof;" and thereupon they gave the guarantee now sued on, in which they referred to the roof as "your roof," and also again used the expression "your town."

W. M. Boulton, for defendants, contended that to permit evidence shewing that the husband was acting merely as agent for the wife would be to allow him to contradict the writings in which he described the roof as his.

J. C. Brokovski, Coldwater, for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—In my opinion the expressions did not necessarily imply the representation on the husband's part that he

was owner of the roof or of the building; they seemed to be used merely as conveniently descriptive of the subject matter under discussion. It was competent for the wife to shew that her husband had entered into the contract as her agent, and to recover damages from defendants for the breach of it. *Lucas v. De la Cour*, 1 M. & S. 249, and *Humble v. Hunter*, 12 Q. B. 310, distinguished.

The breach was well established; the roof leaked badly, and in the end became practically almost useless in spite of defendants' efforts to repair it. The damages should not be confined to the cost of repairs of the roof. It was within the contemplation of the parties that if the roof leaked the building and its walls and contents would suffer. No one but a party or privy to the contract could recover for its breach; the husband was neither party nor privy; it was not in contemplation of the parties that he should have goods there, and the action as against him should be dismissed. The wife is entitled to recover for the loss of the roof because she will have to replace it, and for the damages to the walls, carpets, etc. These damages will easily mount up to \$200, at which they were assessed. Judgment for plaintiff Mary S. Abbott for \$200, with costs from the time she was made a party. Action as regards plaintiff George A. Abbott dismissed with costs of defendants as against him down to but not inclusive of notice of trial. No costs of appeal to either party.

WINCHESTER, MASTER.

OCTOBER 28TH, 1902.

CHAMBERS.

RE EXCELSIOR LIFE INS. CO. AND DE GEER.

Insurance—Life—Policy in Favour of Mother—Advance by Mother on Faith of—Subsequent Marriage of Insured—Apportionment in Favour of Wife—Claim by Mother as Beneficiary for Value.

Motion by the company for leave to pay into Court \$174.25, being the balance due by them under policy No. 5032 on the life of James De Geer, which was claimed by the mother and also by the widow of the insured. The claimants did not object to payment in, and consented to their rights being disposed of in Chambers.

The policy was issued on the 20th September, 1898. The insured was then unmarried. The sole beneficiary was his mother, and she was not at that time a beneficiary for value. On the 24th September, 1900, the mother advanced the insured \$100, on the faith of a letter in which he assured her that she would be safe in making the advance, by reason of the policy being in her favour. The insured was married in

March, 1901, and on the 21st September, 1901, he signed a direction and apportionment of the full amount of the insurance money in favour of his wife, which direction was given to the company immediately thereafter. He died on the 16th June, 1902. The amount payable by the company under the policy was \$974.25. They paid the widow \$800. She claimed the balance also under the direction made by the insured, and the mother also claimed it by virtue of the promises made by the insured.

R. McKay, for the company and the widow, relied on secs. 151, 159, and 160 of the Insurance Act, and *Potts v. Potts*, 31 O. R. 452.

C. E. Hewson, K.C., for the mother, relied on *Book v. Book*, 1 O. L. R. 86.

THE MASTER.—Since the decision of the Court of Appeal in *Book v. Book*, 1 O. L. R. 86, the sections referred to have been amended by 1 Edw. VII. ch. 21, sec. 2, providing that “a beneficiary shall only be deemed a beneficiary for value when he is expressly said to be so in the policy.” In my opinion, the widow of the insured is entitled to the amount in dispute, the amendment governing the case and placing the law as it was declared by Meredith, J., in *Book v. Book*, 32 O. R. 206, whose decision was reversed by the Court of Appeal, 1 O. L. R. 86.

WINCHESTER, MASTER.

OCTOBER 29TH, 1902.

CHAMBERS.

MACLEAN v. WOOD.

Particulars—Statement of Claim—Action to Set aside Resolution of Shareholders of Company—Allegation of Non-compliance with Companies Acts—Submission to Court.

Motion by defendant Wood for particulars under paragraphs 10 and 11 of the statement of claim. Action to set aside a resolution passed by the shareholders of the defendant company, the World Newspaper Company of Toronto, as being illegal, fraudulent, and void, and for an injunction. The plaintiffs in their statement of claim set out the resolution complained of and the calling of the meeting of the shareholders, etc., and in the 10th paragraph alleged “that in calling said meeting of shareholders and in the conduct of said meeting and the passing of said resolution, the provisions of the Ontario Companies Act and amending Acts were not complied with.” Paragraph 11 was as follows:

"The plaintiffs submit that the said resolution and the passing thereof as aforesaid was illegal, fraudulent, and void."

G. M. Kelley, for defendant Wood.

J. A. MacIntosh, for plaintiffs.

THE MASTER.—Particulars under paragraph 10, shewing in what respects the provisions of the Acts were not complied with, should be given: Pullen v. Snelus, 40 L. T. N. S. 363. Paragraph 11 is not an allegation, but merely a submission, and no particulars are necessary.

Order made for particulars of paragraph 10. Costs in the cause.

OCTOBER 29TH, 1902.

DIVISIONAL COURT.

CONLEY v. ASHLEY.

Promissory Note—Action on—Defence of no Consideration—Evidence of Contemporaneous Oral Agreement—Contradictory Written Documents—New Trial—Objection to Evidence not Taken at Trial—Discretion of Court.

Appeal by plaintiff from order of Judge presiding in 1st Division Court in county of Hastings refusing a new trial after a verdict for defendant on a trial with a jury in that Division Court. Action to recover \$100, being the balance unpaid upon a note for \$600 made by defendant, dated 15th December, 1897, payable six months after date to Cynthia A. Loucks or order, and by her indorsed after its maturity, for a valuable consideration, to plaintiff. The defence was that defendant received no consideration for the making of the note, and that, at the time he signed it, it was agreed between him and Albert Loucks, the husband of the payee, that he was not to be personally liable upon it, but was to pay it out of certain moneys coming to his hands for one Harford Ashley. The Judge left the matter to the jury as one entirely at large upon the question of consideration, and open to them, without special regard to the writings, and to be determined upon the whole evidence.

A. B. Aylesworth, K.C., for plaintiff.

E. G. Porter, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—The case went to the jury upon improper evidence and with a charge in which the true questions for their determination were not presented. The evidence of the defendant, which was admitted to prove that, although he signed the note in question and delivered it to Albert Loucks,

a contemporaneous parole agreement existed under which he was not to be personally liable upon it, but was to pay it only so far as moneys of Harford Ashley came to his hands for the purpose, should have been rejected: *New London Credit Syndicate v. Heale*, [1898] 2 Q. B. 487; *Young v. Austin*, L. R. 4 C. P. 553; *Abrey v. Crux*, L. R. 5, C. P. 37: and the jury should have been told that the debt due by Harford Ashley to Albert Loucks, and the forbearance of Albert Loucks in consideration of the giving of the notes, were a sufficient consideration for the making of them by defendant, and the binding character of the sealed agreements executed by defendant and Harford Ashley should have been pointed out to them. Under ordinary circumstances, where objection has not been clearly taken at the time to the admissibility of evidence, and to the charge to a jury, it is a sound rule to refuse to allow a new trial upon these grounds. But where, as here, it plainly appears that there has been an entire misconception on all hands of the real points in issue, and a mistrial has been the result, the Court should exercise its discretion and direct a new trial, because, apart from the evidence of defendant, which is in direct contradiction of his own solemn agreements, there is nothing whatever to support the verdict in his favour.

Appeal allowed, and new trial directed. Costs of first trial and appeal to be costs in the cause.

BRITTON, J.

OCTOBER 30TH, 1902.

TRIAL.

ELLIOTT v. HAMILTON.

Execution—Sale of Land under—Assignment for Benefit of Creditors—Priorities—Costs.

Action to recover possession of the east half of lot 8 in the 7th concession of the township of Tay. On 5th January, 1878, plaintiff recovered judgment against defendant, who was the owner of the land in question, for \$1,567.80 debt and \$22.75 taxed costs. On 19th December, 1896, a writ of fi. fa. was issued against the goods and lands of defendant, and placed in the hands of the sheriff of Simcoe. The sheriff subsequently made a return of "nulla bona" to that part of the writ requiring him to make the money out of defendant's goods, and he seized and duly advertised for sale the interest of defendant in the land in question. The sale took place on the 27th February, 1899. On the 24th February, 1899, defendant made an assignment for creditors under R. S. O. ch. 147, to one Clarke. On the day of sale, and before

the actual sale, the sheriff received a letter from the defendant's solicitor, who then was acting for the assignee, notifying him (the sheriff) of this assignment, and asking him to send memorandum of costs to assignee. There was no tender of amount of costs, no deposit of moneys, and no undertaking on the part of the solicitor that the costs would be paid. The plaintiff's solicitor was present, and the sheriff informed him of the contents of this letter. As costs had been incurred, the sheriff was advised that he had the right to go on and sell, and he sold pursuant to notice. The plaintiff became the purchaser, and a deed to him was executed by the sheriff in due course. The assignee, notwithstanding the sheriff's sale, assumed the right to sell, and did sell and execute a conveyance to one William Hamilton (a son of defendant) of the same land.

D. B. Simpson, K.C., for plaintiff.

R. D. Gunn, K.C., for defendant, contended that under sec. 9 of R. S. O. ch. 147, the sheriff had no right to sell after notice of assignment, and that plaintiff took nothing by his deed. It was admitted that defendant was still in possession, but only as the agent of William Hamilton, and that he claimed as such.

BRITTON, J., held, following *Gillard v. Milligan*, 28 O. R. 645, that the plaintiff was entitled to recover. Judgment for plaintiff with costs.

MACMAHON, J.

OCTOBER 30TH, 1902.

TRIAL.

BAIN v. COPP.

*Insurance—Life—Policy on Life of One Person for Benefit of Another
—Assignment—Death of Assured—Claim by Administrator.*

Interpleader issue tried at Toronto.

By a covenant in a mortgage made by defendants to the Star Life Insurance Company, the mortgagors were required to assure and keep assured with that company during the continuance of the mortgage one or more lives to the extent of £2,500 sterling, and to pay to the insurance company the premiums on such insurances. Defendants endeavoured to insure the life of Alfred E. Copp, son of defendant William J. Copp, but he failed to pass the medical examination. The plaintiff's son, a medical student, on 20th January, 1886, signed an application for insurance on his life for £2,500. This application was accepted by the insurance company, and a policy issued thereon, dated 13th April, 1886. The plaintiff's son reached his majority on 27th February, 1886.

He assigned the policy to defendants after the date of it. The defendants paid the premiums on the policy up to the time of the assured's death on 12th April, 1902. Plaintiff claimed as administrator of the estate of the assured. The amount due on the policy was paid into Court by the insurance company, and this issue was directed.

S. W. McKeown and J. W. McCullough, for plaintiff.

D. E. Thomson, K.C., and J. A. Culham, Hamilton, for defendants.

MACMAHON, J.—The question, which arose in *North American Life Ins. Co. v. Brophy*, 2 O. L. R. 559, 32 S. C. R. 261, under 14 Geo. III. ch. 48, sec. 1, does not arise here, the insurance company having treated the policy as a valid contract by paying the money into Court; and the defendants are, by virtue of the assignment to them, the owners of the policy, they having paid and satisfied the mortgage to the insurance company. *Worthington v. Curtis*, 1 Ch. D. 419, *Vezina v. New York Life Ins. Co.*, 6 S. C. R. 30, and *Hallendal v. Hillman*, 28 O. R. 342 *n.*, followed.

Judgment for defendants upon the issue with costs.

OCTOBER 30TH, 1902.

DIVISIONAL COURT.

MACLELLAN v. HOOEY.

Assessment and Taxes—Tax Sale—Objections to Validity—Uncertainty as to Lands Assessed—Irregularities—Statute Curing—Defects in Advertisement of Sale—New Trial—Absence of Material Witness—Taking Chances.

Appeal by plaintiff from judgment of MEREDITH, J., dismissing an action to recover possession from defendant of lots 5, 6, 7, and 8 on the east side of Maclellan avenue in the town of Trenton, and to set aside a tax sale under which defendant claimed. The defendant in the alternative claimed a lien for taxes paid and for improvements. The plaintiff proved a paper title in himself, and upon defendant putting in his proofs of a tax title, the plaintiff relied upon certain objections to its validity, which were overruled by the trial Judge.

H. L. Drayton, for plaintiff.

H. S. Osler, K.C., and W. C. Mikel, Belleville, for defendant.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.—. . . It was argued that the sale of the lots in question for arrears of taxes was invalid as to lots 7

and 8, because it was uncertain whether these two lots, which are on the east side of Maclellan avenue in Irvine's survey, or lots 7 and 8 on the east side of Maclellan avenue in the Jubilee survey, are the lots assessed and mentioned in the warrant and advertisement and in the certificates of sale.

In the assessment roll for 1892, however, being one of the years for which the taxes are charged on these lots, and for the arrears in which they were sold, lots 7 and 8 in the Jubilee survey are assessed as part of an undivided block of land described by metes and bounds in the roll, while lots 7 and 8 . . . in the Irvine survey are described as lying on the far side of an intervening cross street called King street from the lots in the Jubilee survey. There is, therefore . . . a sufficient distinction upon the face of the assessment roll, shewing plainly which assessment was intended to apply to the several parcels. These taxes undoubtedly remained unpaid for more than three years before the year in which the treasurer's list was made out under which they were sold, and there is, therefore, a sufficient foundation for the further proceedings.

* * * * *

On the 17th January, 1898, a special Act was passed, ch. 56 of 61 Vict. (O.), reciting that many irregularities had occurred in the proceedings necessary for the levying of taxes in the town of Trenton, and the sales of lands for the same. Section 1 of the Act declares the assessments for the year 1892, inter alia, valid. Section 3 provides that "all sales of land for taxes under the said assessments, when any portion of the taxes in respect of which the sales were had were in arrear for the time required by the Assessment Act, and when the lands so sold have not been redeemed, as in the said Act provided, are hereby confirmed and declared valid and binding to all intents and purposes upon all persons concerned and as to the lands so sold."

The section, however, gives a year from the passing of the Act to the owners of all lands so sold for redeeming them by payment to the treasurer of the arrears of taxes. The plaintiff was aware in July, 1899, that the defendant had purchased the lands and had gone into possession of them, and was making large improvements. The present action was not brought until May, 1901.

Under the circumstances, I think the proper conclusion is that the defects in the advertisement of sale, as well as any which preceded it, have been cured by the special Act which I have quoted. It is plain that the taxes for 1892, at all events, were in arrear at the time of the sale in 1896; that the only lots numbers 7 and 8 on the east side of Maclellan

avenue that were sold were those now in question in the Irvine survey, for the two lots 7 and 8 in the Jubilee survey had been redeemed before the sale. The sale of the lots in question falls, therefore, strictly within the terms of sec. 3 of the Act. In addition to this, it is plain that the owner was not in any way prejudiced by any ambiguity in the advertisement of sale, for both sets of lots were advertised for sale, and the owner must be taken to have known that her taxes were in arrear, and that her lots would be sold. The plaintiff, too, who purchased from the owner after the sale for taxes, has not been prejudiced, for he was aware of it, and treated with the town municipality for the purchase of their tax title, and was offered it at the price of the taxes and expenses.

The plaintiff also asks for a new trial upon the ground that the mayor of Trenton was a material witness, and that plaintiff was prejudiced by his inability to procure his attendance at the trial. He was aware of this, however, when he brought the case on for trial . . . and it is too late now to complain. . . . His proper course was to have asked for a postponement of the trial.

The action was, therefore, properly dismissed, and the appeal should also be dismissed with costs.

See *Lount v. Walkington*, 15 Gr. 332; *Hess v. Harrington*, 73 Pa. St. 438; *Black on Tax Titles*, 2nd ed., sec. 407, notes 131, 132.

WINCHESTER, MASTER.

OCTOBER 31ST, 1902.

CHAMBERS.

MORRISON v. MITCHELL.

Particulars—Statement of Claim—Trade Mark—Infringement.

Motion by defendants for particulars of certain paragraphs of the statement of claim in an action to restrain defendants from infringing plaintiffs' trade mark. Issue was joined and the action entered for trial.

C. A. Masten, for defendants.

Grayson Smith, for plaintiffs.

THE MASTER:—In the 6th paragraph the plaintiffs alleged that their goods had for more than ten years been known and described by the trade mark and design in question, which had acquired a particular reputation and value, and, by reason of such use and application by the plaintiffs, such trade mark and design had become the sole and absolute property of plaintiffs. The plaintiffs should not be ordered

to give particulars of whether it was intended by paragraph 6 to set up a common law trade mark. The paragraph itself contains as full particulars as plaintiffs are required to give. *Gillatt v. Lumsden*, 4 O. L. R. 300, distinguished. *Reddaway v. Banham*, [1896] A. C. 199, 210, referred to.

Under paragraph 8 the defendants asked particulars of the acts alleged to be done by defendants whereby they deliberately set about to attempt to appropriate plaintiffs' property. No particulars are necessary under this paragraph. It is immaterial to defendants what acts plaintiffs allege defendants have done in deliberately setting about to attempt, etc. What is necessary is to know what acts defendants are charged with doing in appropriating plaintiffs' property.

Paragraph 9 alleged that defendants at first appropriated and applied and used a single triangle to the valves manufactured and being sold by them. Defendants are entitled to particulars of the names and addresses of the persons to whom it is alleged the defendants sold valves marked with a single triangle.

By paragraph 10 the plaintiffs submitted that defendants had deliberately and wrongfully set about and attempted to appropriate the property of plaintiffs, and, if possible, to invade the rights of plaintiffs. As this submission follows the statements in paragraph 9 as to the acts of the defendants in using a triangle and triangles, no particulars are necessary.

By paragraph 12 it was alleged that defendants had been and were wrongfully and wilfully infringing upon the trade mark and design of plaintiffs in the manufacture and sale of goods similar to those of plaintiffs. Defendants are entitled to know in what respect they are charged in this paragraph, and full particulars should be given.

Paragraph 13 alleged that in the manufacture and sale of the valves similar to the valves manufactured by plaintiffs, the defendants had appropriated and used and applied a trade mark and design of plaintiffs, and had done so with the wrongful purpose and intention of imitating and copying the trade mark and design of plaintiffs, and in that way of obtaining the benefit of plaintiffs' property and of the reputation of plaintiffs' goods. Paragraph 14 alleged that defendants were using and applying in the manufacture and sale of their goods a fraudulent imitation of the trade mark and design of plaintiffs. As it does not appear that the trade mark and design used by defendants is that referred to in the 9th paragraph, full particulars of the trade mark and design

complained of should be given, and also the other necessary particulars in connection therewith.

Paragraph 15 alleged that the defendants had, by their wrongful acts hereinbefore referred to, trespassed upon the goods and rights and property of plaintiffs and were answerable to plaintiffs for such wrongful acts. The facts which make up the trespasses should be given as particulars.

The defendants also asked for particulars of the names of the persons alleged to have been deceived into purchasing steam valves manufactured by defendants, believing that they were the goods manufactured by plaintiffs. No order should be made as to this, because the statement of claim does not contain the allegation.

Order accordingly. Costs in the cause.

NOVEMBER 1ST, 1902.

C. A.

GABY v. CITY OF TORONTO.

Costs—Third Party—Indemnity—Extent of Liability—Court of Appeal—Time for Disposing of Costs—Several Appeals.

Motion by defendants to settle minutes of judgment. Plaintiff had judgment at the trial against the defendants with costs, and at the same time defendants had judgment over against the third party Crang, by which he was ordered to indemnify them against the plaintiff's judgment and the costs, which up to that time and by that judgment had been ordered to be paid by them, and their own costs of defence. The defendants and Crang both appealed from that judgment, and Crang also appealed from the defendants' judgment against him. The appeals were, pursuant to order, argued together as one appeal, and on the 28th June, 1902, the Court dismissed the appeals against the plaintiff's judgment with costs to be paid to him by defendants, reserving the disposition of the third party's appeal from the defendants' judgment against him: ante 440. The plaintiff took out his certificate in that way, and at that time no order could have been made against the third party, in respect of costs in favour of defendants, the question of his liability over being still undetermined. His appeal against defendants was dismissed with costs on the 19th September, 1902: ante 606.

A. F. Lobb, for defendants, contended that the order should contain a direction that the third party should also

pay the costs which defendants have paid or may have to pay under the judgment of 28th June to plaintiff—the costs of their own appeal and the costs of the third party's appeal against them—as they would not otherwise receive the full indemnity to which they were by his contract entitled from the third party.

J. Bicknell, K.C., for the third party.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The appeal being a step in the cause, presenting it to the Court for review just as it came before the Court below for trial, this Court has the same jurisdiction over all the costs of the proceedings therein as the trial Judge had over those which had been incurred when the case was before him. The Court is disposing of all appeals, for convenience sake, as well as to prevent delay in the recovery of the judgment to which plaintiff was entitled, by two orders instead of one, and the time to deal with the question of what costs defendants should receive from Crang is when that part of the appeals which concerns his liability to them falls to be decided. The jurisdiction to do this was not at an end when the order of the 28th June was made, and the proper time to deal with these costs is when the Court is dismissing the third party's appeal, and thus making a final disposition of the litigation as it came before the Court. As to the costs of the third party's own appeal against plaintiff, they should have been ordered to be paid by the third party to plaintiff directly, instead of by defendants in the first instance. The defendants are entitled to be recouped by the third party the costs which may have been paid by them under that part of the order. As to the other costs defendants ask for, they are entitled to them, as their proceedings were not taken unnecessarily or wantonly, but reasonably and in their own interest and for their own protection. They are, therefore, within the scope of the third party's contract of indemnity, and the order should go in the form proposed by defendants. No costs of this motion. The taxing officer should see that the order does not bear with undue severity upon the third party, seeing that all the appeals were argued together, that he had the labouring oar in them all, and that the contention of defendants as to his liability turned chiefly, if not altogether, upon the construction of the contract between them.

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(TO AND INCLUDING NOVEMBER 8TH, 1902.)

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FALCONBRIDGE, C.J.

NOVEMBER 3RD, 1902.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v.
CENTRAL ONTARIO R. W. CO.

Judgment—Consent—Sale of Railway—Petition to Open up—Conflicting Claims to Represent Railway Company—Issue Directed.

Petition by defendants to vacate a consent judgment pronounced in this action on the 27th May, 1902, for immediate sale of the company's railway, on the ground that the judgment was fraudulent and collusive, and the alleged consent upon which it was entered was fraudulent and collusive, and was not the real consent of defendants.

W. Barwick, K.C., and J. H. Moss, in support of the petition, claiming to represent the defendants.

W. R. Riddell, K.C., and R. McKay, opposing petition, also claiming to represent defendants.

D. L. McCarthy, for plaintiffs.

FALCONBRIDGE, C.J.—The order of Meredith, C.J., of 17th October, 1902, if it does not in terms authorize the presentation of this petition, quite clearly leaves the door wide open for its admission. It was conceded that a Judge in Court could not dispose, upon affidavits, of the weighty and complicated questions arising upon the petition, and the only course is to direct an issue wherein all matters in question may be determined, including the status of the different sets of claimants for the right to control the affairs of the defendant company generally, and in particular these proceedings. An order will go directing the trial of an issue at the next non-jury sittings for the county of York. The plaintiffs, being trustees, must be protected as to costs and in every other way. Usual direction as to costs.

NOVEMBER 3RD, 1902.

DIVISIONAL COURT.

ARMSTRONG v. MICHIGAN CENTRAL R. W. CO

Railway—Carriage of Goods—Misdelivery—New Contract—Breach—Negligence.

Appeal by defendants from judgment of County Court of Lambton in favour of plaintiff in an action to recover damages for loss of goods shipped by plaintiff. The goods were consigned to the Canadian Bank of Commerce, and were delivered to Smith & Co. Plaintiff never asked Smith & Co. to pay for the goods, and had never been paid for them. The defendants in their defence pleaded that they had delivered the goods to the order of the Canadian Bank of Commerce, as required by the shipping receipt, and denied any liability. At the trial the shipping receipt signed by plaintiff was put in, and defendants were permitted to rely upon a clause indorsed thereon as follows: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

I. F. Hellmuth, K.C., and E. C. Cattnach, for defendants.

A. B. Aylesworth, K.C., for plaintiff, contended that the clause quoted did not cover or apply to such a case as the present, where the original transit was at an end, and an agreement for a new one had been entered into, and where the loss had occurred by reason of the negligence of defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—Upon the facts in evidence plaintiff is entitled to recover. The defendants' agent at Bridgen received instructions from plaintiff to re-ship the goods from London to Campbell & Co., at Montreal, and agreed that this should be done, and so advised defendants' agent at London. After a few days' delay the shipping receipt was indorsed and delivered by the bank agent in London to defendants' agent there; the existing contract to deliver the goods to the order of the Canadian Bank of Commerce in London was then terminated, and the new contract by defendants to carry the goods to Montreal and deliver them to Campbell & Co. arose. Instead of carrying out this new contract, the defendants,

owing to the misconception of their agent at Brigden, delivered them to A. W. Smith & Co. in Toronto. The breach committed by defendants was not, therefore, any breach of the contract to carry the goods to London and deliver them to the order of the Canadian Bank of Commerce there, but of a new contract to carry them from London to Montreal and deliver them to Campbell & Co. : *McGill v. Grand Trunk R. W. Co.*, 19 A. R. 245. Such a contract is not alleged in the statement of claim, but the pleadings can be amended to suit the facts. Under these circumstances, the condition upon which defendants rely cannot be treated as an answer to plaintiff's claim. Even if it could be found as a matter of fact that the new contract to carry from Toronto to Montreal should be treated as having been subject to the terms of the shipping receipt under which the original contract was entered into, it could not be held, in the face of *Vogel v. Grand Trunk R. W. Co.*, 11 S. C. R. 612, that defendants, having received the goods at London as carriers upon a new contract to carry them to Montreal, can protect themselves against the consequences of their own negligence by such a condition as this, for the case comes directly within the express terms of sec. 246 of the Railway Act, 51 Vict. ch. 29 (D.), as interpreted by the Supreme Court in the *Vogel* case.

Appeal dismissed with costs; but the judgment should order the transfer from plaintiff to defendants of plaintiff's right to the goods in question, and to recover the value of them from A. W. Smith & Co.

FALCONBRIDGE, C.J.

NOVEMBER 4TH, 1902.

CHAMBERS.

RE PINKNEY.

Security for Costs—Petition by Parents for Custody of Infant—Petitioners out of Jurisdiction—Respondents admitting Rights of Petitioners.

Appeal by William Corbett and Elizabeth Corbett from order of Master in Chambers (ante 694), refusing their application for security for costs of a petition by Thomas Pinkney and Emily Jane Pinkney for the custody of their infant son Leland Pinkney. The petitioners lived out of the jurisdiction. The Master in Chambers was of opinion that, as the respondents were willing to give up the boy to his parents, there was no necessity for the petitioners giving security.

Shirley Denison, for appellants.

W. E. Middleton, for petitioners.

FALCONBRIDGE, C.J.—The affirmance of the Master's order would leave the door open for the consideration of the merits in determining questions of security for costs, which should not be. The present case may result in the Corbetts being mulct in costs, and they should have security for costs. *Sample v. McLaughlin*, 17 P. R. 490, and *Palmer v. Lovett*, 14 P. R. 415, distinguished.

Appeal allowed with costs here and below to the appellants in any event of the petition. Security to be in the sum of \$100.

WINCHESTER, MASTER.

NOVEMBER 5TH, 1902.

CHAMBERS.

PARRAMORE v. BOSTON MFG. CO.

Discovery—Examination of Parties—Production of Documents—Patent Action—Forfeiture—Non-performance of Condition on which Patent Granted—Affidavit.

Motion by defendants for an order that plaintiff do file a further and better affidavit on production and attend for re-examination for discovery, and answer the questions which he refused to answer on his examination, and for an order that the J. B. Kleinert Rubber Company do make discovery of documents, and that the manager of that company in Toronto do attend for examination for discovery.

Action to restrain defendants from infringing a patent for a hose supporter.

G. H. Kilmer, for defendants.

J. Bicknell, K.C., for plaintiff.

W. N. Tilley, for the J. B. Kleinert Rubber Co.

THE MASTER.—The application for further production and examination of plaintiff was opposed on the ground that the defendants have no right to examine into the matters in question, as they desire to do so for the purpose of declaring the plaintiff's patent forfeited under the statute. The defendants do not claim a forfeiture, but properly contend that the rights of plaintiff have been extinguished on non-performance of the condition on which he obtained his patent. *Hoffman v. Postill*, L. R. 4 Ch. 673, *Pye v. Butterfield*, 5 B. & S. 829, 837, *Hambrook v. Smith*, 17 Sim. 209, *In re Haelde's Patent*, 51 L. T. N. S., referred to.

Even if the present case were one of forfeiture, plaintiff should have taken that objection on his examination. Counsel acting for him on that examination makes an affidavit taking this objection, but that is not sufficient; the plaintiff

should make the affidavit himself if it were a proper case in which to make one. The defendants are entitled to the fullest discovery from plaintiff; that has been so far withheld from them. The plaintiff must attend at his own expense and submit to be examined upon the issues raised in the pleadings, and also file a further and better affidavit on production. His agents have statements which he should produce. As to his obtaining all information necessary to give the fullest discovery, see *Bolckow v. Foster*, 10 Q. B. D. 161; *Leitch v. G. T. R. Co.*, 13 P. R. 369, 373. Costs of this part of the application to defendants in any event.

Application against the J. B. Kleinert Rubber Company adjourned until after examination of plaintiff concluded.

MACMAHON, J.

NOVEMBER 5TH, 1902.

TRIAL.

CROMPTON AND KNOWLES LOOM WORKS v.
HOFFMAN.

Sale of Goods—Entire Contract—Property not Passing—Action for Price—Deduction for Defects—Damages.

Action by a company carrying on the business of manufacturing looms and attachments at Worcester, Mass., against J. D. Hoffman, of Stratford, and W. J. Shaver, of Toronto, carrying on business as the Maple Leaf Elastic Webbing Company, to recover \$564.65, balance of the price of a loom and attachments sold and delivered to defendants as alleged. The defendants set up that the goods were shipped to them in sections, and that portions had not yet been delivered; that the goods delivered were worthless; and they counterclaimed for damages.

E. Sydney Smith, K.C., and J. Steele, for plaintiffs.

G. G. McPherson, K.C., for defendants.

MACMAHON, J.—The offer of plaintiffs to furnish a loom and the necessary fittings for running the same was contained in a letter which mentioned the various articles and their prices. The defendants accepted the offer by letter, with a variation, not ordering some of the articles mentioned in plaintiffs' letter. Plaintiffs contended that the order for the loom was one contract, and the other items in the offer of plaintiffs, which was accepted by the defendants' order, formed a separate contract or contracts. It is clear, however, that the order formed one entire contract: *Baldy v. Parker*, 2 B. & C. 37; *Elliott v. Thomas*, 3 M. & W. 170; *Bigg v. Whisking*, 14 C. P. 195. The items of the sale were: "One-half

cash payment, balance in two notes of equal amount; our customary lien to cover all machinery purchased." The lien agreement was forwarded for defendants to sign, but they did not sign it. The machine was mechanically well built, and similar in construction to a number manufactured by plaintiffs, regarding which no complaints were received. Alterations were necessary to make the loom efficient to manufacture elastic webbing. The property in the loom had not passed to defendants, for it was sold subject to the customary lien contract used by plaintiffs, and it remained in their possession subject to the lien upon which it was sold by plaintiffs. The defendants, notwithstanding the existence of the lien, were entitled to shew that the loom was not as warranted, and so reduce plaintiffs' claim by the difference between the value of the loom as warranted and the value as it was shewn to be, as evidenced by the cost defendants were put to in remedying the defects found to exist: *Cull v. Roberts*, 28 O. R. 591; *Copeland v. Hamilton*, 9 Man. L. R. 143. This cost amounted to \$69. Even if defendants were entitled to recover consequential damages, they could not do so while the goods remained the property of plaintiffs. Even if the consequential damages claimed were not too remote (as to which see *Fuller v. Curtis*, 100 Ind. 237, *McCormack v. Vanatta*, 43 Ia. 389, *Osborne v. Poket*, 33 Minn. 10, *Brayton v. Chase*, 3 Wis. 456), the defects in the machine were such as might have been remedied in a few days at the cost of a few dollars, had a competent mechanic been engaged for the purpose.

Judgment for plaintiffs for \$395.63, with interest from 1st October, 1900, and costs. Counterclaim dismissed with costs.

TRIAL.

MACMAHON, J.

NOVEMBER 5TH, 1902.

LANGLEY v. LAW SOCIETY OF UPPER CANADA.

Contract—Printing of Reports—Assignment by Printers of Claim for Payment—Subsequent Assignment for Creditors—Sale of Claim by Assignee—Rights of Vendee—Judgment—Set-off.

Action by the liquidator of the Publishers' Syndicate, Limited, to recover from the Law Society \$346, claimed as the balance due in respect of the printing and publishing of certain law reports for the society.

C. D. Scott and S. B. Woods, for plaintiff.

H. Cassels, K.C., for defendants.

MACMAHON, J.—The Law Society had contracted with the firm of Rowsell & Hutchison for the printing and publishing of the reports. On the 17th January, 1900, Rowsell & Hutchison made an assignment for the general benefit of their creditors, pursuant to R. S. O. ch. 147, to defendant E. R. C. Clarkson. At the time of the assignment certain printing was in progress under the contract, a large amount of it being in galley form, and some type-setting being finished. The editor of the reports made an arrangement with defendant Clarkson by which the work was to be continued and completed for the Law Society, the defendant Clarkson, as assignee, agreeing to continue and complete the reports then under contract without charging any profit on it. Clarkson said that the Law Society was to pay for the work then partly performed; and the editor, in his report to the Law Society, said that Clarkson, if guaranteed his disbursements, intended to carry out the contract, as assignee, and earn the moneys payable under it. On 10th March, 1900, Clarkson sold the assets of Rowsell & Hutchison's estate, the Publishers' Syndicate becoming the purchasers of parcel No. 3, in which was included "the printing and work in progress unfinished at that date." This item comprised the work done by Rowsell & Hutchison on the reports prior to their assignment, and also the amount expended by Clarkson in furthering the completion of the reports under his agreement with the editor, making a total of \$847.50, of which \$346 was attributable to the work done by Rowsell & Hutchison. On the 26th December, 1899, Rowsell & Hutchison had assigned to the Bank of Hamilton "all book accounts, claims, and choses in action which are now owing to the parties of the first part (Rowsell & Hutchison), or which may hereafter be owing to parties of the first part," as security for indebtedness. On the receipt by Clarkson of the \$847.50, he paid over to the Bank of Hamilton the \$346, as being a book account or chose in action realized from the estate.

The Law Society were to pay Clarkson for the work then partly performed, he agreeing to carry out the contract as assignee in order to enable him to earn the moneys payable under it, which would necessarily include this partly performed portion of it. He assigned the contract to the Publishers' Syndicate, who finished the work required to be performed under the contract, and the amount of the contract price, \$2,210.58, was paid by the Law Society to the Publishers' Syndicate, with the exception of the \$346. Until the printing and binding of the reports was completed according to the terms of the contract, there would be no debt

due from the Law Society to Rowsell & Hutchison, or to the assignee of their estate. When completed and the reports accepted, the Law Society would be obliged to pay the contract price. Clarkson sold the printing and work unfinished in one lot, and made no division as to what had been done by Rowsell & Hutchison before their assignment, and that done by Clarkson after the assignment to him, Clarkson informing the purchasers of the terms of the agreement entered into between himself and the editor. After becoming aware that Clarkson had sold and assigned to the Publishers' Syndicate and been paid by them for the whole amount of the work done, the Law Society corresponded with the Publishers' Syndicate, and, with full knowledge of the conditions under which the Syndicate were completing the contract, took the benefit of it. When the Syndicate purchased the work done by Rowsell & Hutchison, the amount thereof was a debt due to the estate, and when paid to the assignee the money became the property of the bank under the assignment to it, and was properly paid to the bank by the assignee. There can, therefore, be no set-off by the Law Society of its judgment recovered against Rowsell & Hutchison against such sum.

Judgment for plaintiff against the Law Society for \$346, with interest from 1st June, 1900, and costs on the High Court scale.

WINCHESTER, MASTER.

NOVEMBER 6TH, 1902.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Discovery—Examination of Plaintiff—Default of Attendance—Motion to Dismiss Action—Proof of Default—Affidavit of Solicitor—Cross-examination—Ex Parte Certificate of Examiner—Locus Penitentiae.

Motion by defendant Ryckman to dismiss action on the ground of non-attendance of plaintiff for examination for discovery.

C. W. Kerr, for applicant.

W. R. Smyth, for plaintiff.

THE MASTER.—In support of the application were read the subpoena and appointment for plaintiff's examination and affidavit of service thereof on plaintiff and admission of service of appointment by his solicitor; also a certificate of the special examiner as to what took place before him, and an affidavit of the applicant's solicitor. The plaintiff asked for

an adjournment to cross-examine the solicitor for applicant on his affidavit. This I considered unnecessary and refused it. Counsel for plaintiff then contended that the certificate of the examiner was improperly issued and should not be allowed, citing *Re Ryan v. Simonton*, 13 P. R. 299. It was held in *Jones v. Macdonald*, 14 P. R. 109, that such a certificate of an examiner is good evidence of the proceedings before him, notwithstanding that it was settled *ex parte*. The certificate was not improperly issued, and the examiner was obliged to issue it when demanded. The plaintiff made default, he says, on account of ill-health, but there is no evidence as to this, other than what plaintiff appears to have told his solicitor. It does appear that he went to Montreal that evening, and could not, in consequence, attend on the adjourned appointment for his examination.

Order made requiring plaintiff to attend for examination at his own expense and submit to be examined. Costs to defendant in any event.

WINCHESTER, MASTER.

NOVEMBER 6TH, 1902.

CHAMBERS.

REILLY v. McDONALD.

Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act.

Motion by judgment creditor to make absolute a garnishing summons. On 24th April, 1901, defendant recovered judgment against plaintiffs for costs, which were taxed at \$209.49. George Reilly, one of the plaintiffs, died on 1st April, 1901, and probate of his will was granted to his sister and co-plaintiff, Mary Sullivan, on 23rd September, 1901. Three days later the action was revived. The plaintiffs appealed from the judgment, and their appeal was dismissed on the 11th March, 1902, with costs taxed at \$132.40. The action was to compel the defendant to specifically perform a contract to purchase lot 13 in the 4th concession of the township of York. The plaintiff George Reilly in his lifetime owned the north half of this lot, while the father of the plaintiffs owned the south half. The money attached by the defendant was certain rent due by the tenant of this lot, the garnishee, who appeared and admitted owing \$155, which he was willing to pay as the Court might direct.

W. A. Skeans, for the judgment creditor.

W. Norris, for the judgment debtor, contended that the rent was due, not to the plaintiffs, against whom the judg-

ment had been obtained, but to plaintiff Nan O'Reilly, as administratrix of her father's estate, and to Mary Sullivan, as executrix of her brother.

The garnishee, in person.

THE MASTER.—No caution was registered against the lands under the Devolution of Estates Act. The plaintiffs, by bringing the action in their own names, instead of in the name of the administratrix, asserted that the land vested in them as heirs under sec. 13, although the administratrix assumed to make a lease to the tenant (garnishee). This she apparently did for the benefit of the heirs, without any legal authority. The rent was due to plaintiffs as heirs of their father, and to plaintiff Mary Sullivan as executrix of her brother. Order made for payment of \$3 out of the \$155 to the garnishee for costs, and of the balance to the judgment creditor.

Moss, J.A.

NOVEMBER 6TH, 1902.

C. A.-CHAMBERS.

MINERVA MFG. CO. v. ROCHE.

Court of Appeal—Leave to Appeal—Question of Costs Dealt with on Facts.

Motion by defendants for leave to appeal from the order of a Divisional Court (ante 530) upon a question as to the scale of costs.

W. E. Middleton, for defendants.

A. C. McMaster, for plaintiffs.

Moss, J.A.—No case was shewn for permitting a further appeal. The case was dealt with by the Court below as one turning on the particular facts. The pleadings shew that plaintiffs were relying upon the letter or undertaking given on behalf of defendants on the 21st November, 1901, rather than upon the original arrangement for purchase, and that the defendants so understood it and shaped their defence accordingly. On the question of fact as to the nature of the original arrangement, the Court below accepted the plaintiffs' version. The previous decisions have been left untouched by the judgments in this case. They have created no precedent in law, and leave to appeal on the question of fact should not be given. Application refused.

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NOVEMBER 7TH, 1902.

DIVISIONAL COURT.

TURNER v. TOWNSHIP OF YORK.

Municipal Corporations—Highway—Raising Level of—Injury to Adjoining Land — Backing Water on—Culvert — Inappreciable Injury.

Appeal by plaintiff from judgment of MACMAHON, J. (6th March, 1901) dismissing action brought by plaintiff, a farmer, against the township corporation for an injunction restraining them from casting upon his land, by means of a culvert across one of their roads, a large quantity of surface water, and for casting it upon him in a more condensed form than it would naturally have come.

J. R. Roaf, for plaintiff.

A. B. Aylesworth, K.C., for defendants.

THE COURT (FALCONBRIDGE, C.J., STREET, J.), after a careful examination of the evidence and the plans shewing the levels and profile of the land in question, saw no reason for differing from the conclusion at which the Judge who heard the case arrived, viz., that plaintiff has not been injured to any appreciable extent, or in any appreciable manner, by the culvert through the road of which he complained. Appeal dismissed with costs.

CHAMBERS.

REILLY v. McDONALD.

Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act.

The order of the Master in Chambers (ante 721) was reversed on appeal.

W. Norris, for judgment debtors.

W. A. Skeans, for judgment creditors.

O. W. R.—NO. 39

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MACMAHON, J.

NOVEMBER 10TH, 1902.

CHAMBERS.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Præcipe Order for—Application for Increased Amount—Election.

Appeal by defendants from order of local Master at Ottawa dismissing their application for an order requiring plaintiffs to give increased security for costs.

The plaintiffs are a trading company carrying on business in the State of New York. A præcipe order for security for costs was obtained by defendants under Rule 1199, and, instead of giving a bond for \$400, the plaintiffs paid \$200 into Court under Rule 1207.

The application for increased security was made after examinations for discovery, interlocutory applications and appeals, attendance of counsel at New York to take evidence under a foreign commission, etc., by which a large amount of costs was incurred.

The local Master considered that the defendants' taxable costs would by the time the case was tried amount to at least \$500, but he held them bound by their election to take the security obtainable under a præcipe order, relying on *Trevelyan v. Myers*, 15 C. L. T. Occ. N. 135, and *D'Ivry v. World Newspaper Co.*, 17 C. L. T. Occ. N. 82.

The Rule in force when these cases were decided was Rule 1250 of the Consolidated Rules of 1888: "The amount of security may be increased or diminished from time to time by the Court or a Judge."

The present Rule, 1208, is: "The amount of security, whether directed to be given by an order issued on præcipe or otherwise, may be increased or diminished from time to time by the Court or a Judge."

The Master thought the cases cited applied, notwithstanding the change in the Rule.

C. J. R. Bethune, for appellants.

G. E. Kidd, for plaintiffs.

MACMAHON, J.—By the terms of Rule 1208, the fact of the defendants having obtained a præcipe order by which a definite amount of security was provided for, bound them to no greater extent than if they had in the first instance made a special application for security. In either case the defendants must shew facts disclosing a proper case for increased security. . . . The Master having stated that defendants' costs will probably amount to \$500, and that the increase is largely due to plaintiffs' interlocutory motions and appeals,

the simple question is: have the defendants made out a case for increased security? I think they have. The estimated costs of defendants amount to two and a half times the sum for which security has been given. And, although defendants might have foreseen that a commission to take the evidence of witnesses in New York would issue, and that an examination for discovery would probably be necessary, they could not have anticipated at the time the order for security was obtained that an appeal would be made to a Judge in Chambers and then to a Divisional Court, the costs in connection with which would amount to one-half the sum deposited in Court as security.

[Reference to the English O. LV. r. 2; Republic of Costa Rica v. Erlanger, 3 Ch. D. 62; Massey v. Allen, 12 Ch. D. 807; Bentsen v. Taylor, [1893] 2 Q. B. 193.]

Both the English Rule and our own contemplate that there may be more than one application for increased security. . . . No reservation is necessary in any order for leave to apply again, as the learned Master seemed to think.

The great increase in the costs . . . could not have been foreseen by defendants when the præcipe order for security was obtained, and the order of the learned Master must, therefore, be reversed, and the plaintiffs ordered to give the defendants additional security by bond in \$600 or by payment into Court of \$300.

The costs of the appeal and of the motion before the Master will be to the defendants in any event.

FALCONBRIDGE, C.J.

NOVEMBER 10TH, 1902.

WEEKLY COURT.

RE PUBLISHERS' SYNDICATE.

Company—Winding-up—Claim against Assets—Breach of Contract—Damages.

Appeal by William J. Greig, David Connery, and Roderick J. Parke, from the certificate or report of an official referee, whereby he allowed Greig and Parke nominal damages of \$1 each only, and disallowed the claim of Connery for damages as against the estate of the syndicate, an incorporated company in liquidation.

Damages were sought for the breach on the part of the syndicate of the contracts contained in certificates of registration issued to them respectively by the syndicate, whereby the syndicate agreed, in consideration of \$10.50 paid by each of the claimants to the syndicate, to sell to each of them for the period of five years from the dates of their respective cer-

tificates all books, magazines, periodicals, and other printed matter, on the terms mentioned in the certificates.

R. McKay, for the appellants, contended that they were entitled to rank as creditors against the estate of the company for substantial damages as established by the evidence, and that the liquidator should pay the costs.

C. D. Scott, for the liquidator, contra.

FALCONBRIDGE, C.J.—The referee was right in disallowing the claim of Connery, not perhaps because Connery committed a breach of the contract entitling the syndicate to put an end thereto, but because the selling of books at a profit was not contemplated by the contracts, and therefore loss of prospective profits, besides being obnoxious to the general rule, was never in contemplation of the parties. His general statement that he bought a great many books besides, does not afford any reasonable basis for a specific finding of damage.

But as to Greig and Parke, the learned referee has confounded loss of prospective profits or speculative damage with the loss which these two claimants will sustain by reason of not being able for three years to buy a certain quantity of books for their own use at a certain promised discount; i.e., at a price less than they can buy them for in the open market.

Parke's damages assessed at \$30; Greig's damages at \$20. No costs of appeal as to Connery's claim. Parke and Greig to rank for \$30 and \$20 respectively, with \$20 each costs allowed by the referee, and costs of this appeal fixed at \$10 each.

NOVEMBER 10TH, 1902.

DIVISIONAL COURT.

BENTLEY v. MURPHY.

Ship—Contract to Sell—Co-owners—Partnership—Authority of One Co-owner to Bind the Other—Ratification—Specific Performance—Damages.

Appeal by plaintiffs and cross-appeal by defendant Craig from judgment of BRITTON, J., at the trial (1 O. W. R. 273). The action was to compel specific performance of an alleged agreement by defendants to sell and deliver to plaintiffs a steamer called the "Island Queen," then at Kingston, for \$5,000, payable \$2,500 on delivery and \$2,500 six months from the date of delivery.

The trial Judge found that the contract was made by Murphy on behalf of himself and Craig; that Murphy and Craig were not only part owners of the steamer, each being entitled to 32 shares, but were partners in the venture; that Craig, as between himself and Murphy, insisted on getting

the whole of the cash payment, but, subject to that, he ratified and confirmed the agreement for sale by Murphy. He held, however, that specific performance should not be enforced unless plaintiffs were willing to do equity by giving a mortgage on the vessel for the unpaid purchase money. There was a finding for plaintiffs against both defendants upon the contract, and a reference was ordered as to damages.

The plaintiffs appealed on the grounds that damages were not an adequate remedy, and that the trial Judge erred as to the mortgage for the unpaid purchase money.

The defendant Craig appealed on the ground that he and Murphy were not partners, and Murphy had no authority to dispose of his (Craig's) shares in the vessel.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., LOUNT, J.

L. G. McCarthy, K.C., and A. M. Stewart, for plaintiffs.

T. Mulvey, K.C., for defendant Murphy.

C. H. Ritchie, K.C., and A. E. Knox, for defendant Craig.

MACMAHON, J. (after stating the facts at length):—One of the findings in the judgment is, that defendants were partners in the venture, i.e., in the ownership of the vessel. That was not the relationship existing between them. The learned trial Judge, entertaining that view, was doubtless influenced to some extent in reaching a conclusion that there was a valid contract binding on both defendants. For, if they were partners in the venture, Craig would be bound by Murphy's offer.

[Reference to Abbott on Shipping, 14th ed., pp. 116, 129, and to Lindley on Partnership, 6th ed., pp. 25, 26, as to the difference between co-ownership and partnership.] . . .

Craig says Murphy was not authorized by him, and had no authority to give an option on his behalf for the sale of the steamer. This direct and positive statement remains uncontradicted. . . .

It was urged that, even if Murphy had no authority from Craig to give the option, what is contained in Craig's letter of the 9th June to Murphy, and his subsequent conduct, shew ratification of Murphy's act. Craig stated in the letter that he would wire Murphy on the Tuesday "if I can get off with the Government, and if so you had better get the Toronto people (the plaintiffs) to promise all cash, and then wire him (Craig) to go to Toronto to close deal." The letter in effect says: "If the plaintiffs pay cash for the vessel, I am willing to sell, and, on being notified that they will do so, I will go to Toronto and close the deal." On the 11th (Tuesday) Craig telegraphed Murphy: "If Toronto parties pay cash for my

interest, I will assign to them." On the same day Murphy replied: "Will pay cash. Come at once."

I fail to see in this the slightest evidence of ratification of Murphy's act in giving the option. Bentley knew that Craig was a co-owner with Murphy, that Craig had repudiated Murphy's authority to sign the option on his behalf, hence Bentley's desire to secure Craig's signature to the option. Craig insisted on being paid \$2,500 in cash for his interest in the steamer, and at the meeting in Foy & Kelly's office on the 17th June he expressed his readiness to assign his 32 shares, on being paid that amount. That is not a ratification of the offer made by Murphy to accept \$2,500 cash and the balance of the purchase money in six months.

When Craig, on the 9th June, repudiated Murphy's authority, that was a revocation by Craig of the offer, as far at least as he was concerned, although he was prepared to negotiate on different terms, provided the Government did not purchase the steamer.

The judgment directed to be entered against the defendant Craig must be set aside, and judgment directed to be entered for him, dismissing the action as against him with costs.

The judgment directed to be entered against Craig being set aside, the position of the plaintiffs in regard to the defendant Murphy has been materially changed.

It was laid down in *Cullen v. Wright*, 8 E. & B. at p. 657, that "where a person induces another to contract with him, as agent of a third party, by an unqualified assertion of his being authorized to act as such agent, he is answerable to the person who so contracted for any damages which he may sustain by reason of the assertion of authority being untrue."

* * * * *

The principle enunciated in *Cullen v. Wright* has been upheld by a long line of authorities.

But is the present case governed by *Cullen v. Wright*? Bentley, as I have already stated, prepared the option which Murphy signed, and at that time he knew that Craig was part owner in the steamer, and as a lawyer he knew that, without express authority from Craig, Murphy could not bind him, and acting on that knowledge he immediately on reaching Kingston endeavoured to induce Craig to sign the option so as to ratify Murphy's act. Now, Bentley knew as a fact that Murphy was not the sole owner, and he did not sign the offer as agent for Craig, nor is there in the body of it any statement that he is acting as such. And in *Cullen v. Wright*, and a large number of authorities in which that case is followed, there was in every case a representation by the defendants in the body of the contract, or by signing, that they are agents of a named

principal. And it is only on such a representation that Murphy would be liable on his implied warranty as agent. [Reference to *Beatty v. Lord Ebury*, L. R. 7 Ch. 800.]

There was no misrepresentation in point of fact as to agency. The offer was for a sale of the vessel by Murphy when Bentley knew he had only a part interest therein. Murphy assumed that Craig would be satisfied with the proposed sale, but there was no representation that he would get in Craig's interest.

As Murphy would not transfer his shares without a mortgage on the vessel or promissory notes which he could discount, the defendants are entitled to recover such damages as they may be able to shew on a reference.

Before accepting a reference the plaintiffs had better consider what their position would have been if they had become the assignees of Murphy's interest and the owners of a moiety in the vessel.

If Craig was in possession of the vessel, his authority over her would be supreme. Where a vessel is owned in moieties, the owner who is in possession seems for all practical purposes to have the power of the majority, while the right of his co-owner seems to be restricted to those of a minority: *Abbott*, 14th ed., p. 120. He might refuse to employ the vessel in any venture which the new owners of Murphy's moiety might desire to use her in. He might be unwilling to run the risk of becoming bound as a partner for supplies for the vessel, which he would be if he consented to the vessel going into employment. For the position of the parties is altered when the owners determine to exercise the right of using her—the part owners of a ship becoming partners in respect of the voyage, its expenses and profits: *Abbott*, 14th ed., p. 132.

The costs of the reference will be at the plaintiffs' risk if in the result they are entitled only to nominal damages.

If a reference is not accepted, there will be judgment for the plaintiffs for nominal damages, fixed at \$20, with costs on the Superior Court scale.

LOUNT, J., agreed with the judgment of MACMAHON, J.

MEREDITH, C.J., dissented, holding that the authority of Murphy to act for his co-defendant as well as for himself in selling the vessel and entering into the contract with plaintiffs, and the subsequent ratification and adoption of the contract, had been satisfactorily shewn, and that specific performance should be decreed.

OSLER, J.A.

NOVEMBER 10TH, 1902.

C.A.—CHAMBERS.

RE LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

Controverted Election Petition — Affidavit of Bona Fides — Commissioner—Agent for Solicitor.

Motion to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of bona fides and of notice of presentation upon the respondent.

C. A. Masten, for respondent.

R. A. Grant, for petitioners.

OSLER, J.A.—From the affidavits filed, and the argument, the objection to the proceedings appears to be that the commissioner before whom the petitioners' affidavit of bona fides, etc., was sworn, was disqualified, he being the solicitor by whom the petition and affidavit were prepared or filled up, and by whom as agent for the petitioners' solicitors the petition, as appears by the indorsement thereon, was presented.

The affidavits filed shew that Messrs. Kerr, Davidson, Paterson, & Grant were instructed to present a petition against the election; that they sent one Sutherland, a clerk in their office, to Napanee with the necessary forms of petition and affidavit to be signed and sworn to by the petitioners, whoever these might turn out to be; that he went to the office of Mr. German, a local solicitor, who filled up the forms and as commissioner swore the petitioners to the affidavit; that Sutherland took the papers back with him to his principals, who, after indorsing the petition as follows, "This petition is presented by T. B. German, of the town of Napanee, in the county of Lennox and Addington, agents for Messrs. Kerr, Davidson, Paterson, & Grant, of the city of Toronto, solicitors for the petitioners," returned it to German, who filed it with the local registrar at Napanee on the 2nd August, 1902, together with the affidavit and notice of presentation, which latter appears to be filled up in German's handwriting. Copies of all these proceedings were afterwards served upon the respondent.

A solicitor was not, nor was his clerk, partner, or agent, under any disability at common law which disqualified either of them from swearing any one to an affidavit in a cause in which the former was the solicitor on the record. A clear rule or settled practice creating such disqualification in the case before me must be shewn to entitle the applicant to succeed.

If Con. Rule 522 applies to the proceedings in an election petition, it does not help the respondent, as it extends only to affidavits sworn before the solicitor of a party to the cause or his clerk or partner.

The Rules of Court touching controverted elections make no provision on the subject, and s. 113 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, provides that so far as these Rules do not extend, the principles, practice, and Rules on which petitions touching the election of members to the House of Commons of England, were on the 15th February, 1871, dealt with, shall be observed.

I am referred to nothing under this head which touches the point.

Then it is said that, in the absence of any Rule or decision, the principle of certain decisions in equity ought to be applied, and the agent of the solicitor in the cause who prepared the papers ought to be held to be within the mischief which is struck at. *Foster v. Harvey*, 11 W. R. 699, S.C., in appeal, 9 L. T. N. S. 404, *Duke of Northumberland v. Todd*, 7 Ch. D. 777, and *In re Gregg*, L. R. 9 Eq. 137, 143, were cited.

It is not suggested that any actual impropriety has occurred or that any wrong or injustice has been done. The objection is, therefore, a strictly technical one, and, if we are to look for analogy or principle, I see not why we should go beyond our own Rule of Court above referred to, which does not include an agent.

Further reason for holding that the objection fails, even had the affidavits been sworn before one of the members of the firm who now appear to be the petitioners' solicitors, is, that when the affidavits were sworn there was no cause or matter in Court, and therefore no solicitor on the record.

In this respect the case is more like *Regina ex rel. Blaisdell v. Rochester*, 12 U. C. R. 630, than any which has been cited. There, the relator's attorney took the recognizance and affidavit on which the County Judge acted in granting the fiat for a municipal summons. The Court said, per Draper, C.J., that no rule or practice governed the point, and, even if they doubted the strict regularity of the proceeding on the ground of the commissioner being also the attorney, they would be slow to interfere unless a very strong necessity for so doing was made out. The case was compared to that of the suing out of a *capias* on an affidavit taken before a commissioner who afterwards acted as plaintiff's attorney in suing out the writ.

On every ground the objection fails, and the motion is dismissed, with costs to be taxed and added to the petitioners' general costs of the cause or paid to the petitioners in any event.

MACMAHON, J.

NOVEMBER 13TH, 1902.

WEEKLY COURT.

KELLY v. SMITH.

*Interest—Claim for Price of Goods Sold—Interest not Claimed in
Writ of Summons—Report—Appeal—Items—Costs.*

Appeal by plaintiff from report of local Master at Sarnia in an action for the price of fruit and vegetables sold to defendants by plaintiff. The Master found that plaintiff was entitled to \$118.83 paid into Court and to a further sum of \$74.78.

A. Weir, Sarnia, for appellant, contended that interest should be allowed from the date of the issue of the writ of summons, and that certain items of his account were improperly disallowed or reduced by the Master.

G. H. Watson, K.C., for defendants.

MACMAHON, J.—With regard to the claim for interest, which has not been dealt with by the learned Master in his report, and in respect of which he was not asked to make any special report, the appeal fails. Mr. Weir supposed that the indorsement on the writ of summons claimed interest; but a reference to the writ issued shews that no claim for interest is made on the balance, which by the special indorsement appears to have been \$368.13. Had the claim been made, I should probably, in view of *Irving v. Victoria Harbour Co.*, referred to in a note in *Holmsted and Langton's Practice* under the *Judicature Act*, p. 149, have sent the report back for a special finding.

The learned Judge then dealt with the other items in question on the appeal, and allowed the appeal as to one item of \$12, dismissing it as to all the others. The defendants having succeeded as to nine-tenths of the amount involved in the appeal, the plaintiff was ordered to pay nine-tenths of the costs.

THE
ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING NOVEMBER 22ND, 1902.)

VOL. I. TORONTO, NOVEMBER 27, 1902. No. 40

FALCONBRIDGE, C.J.

NOVEMBER 14TH, 1902.

TRIAL.

COBURN v. HARDWICK.

Negligence—Playing Dangerous Game on Public Highway—Permitting Infant of Tender Years to Engage—Injury to Infant—Liability of Person Directly Causing the Injury—Contributory Negligence.

Action on behalf of Alexander Coburn (an infant of tender years, residing with his father at Falls View, in the township of Stamford), by his father and next friend, to recover \$1,000 damages for personal injuries received by reason of the defendant, a wholesale coal merchant residing at the town of Niagara Falls, throwing a large iron ball which struck plaintiff on the right hand, lacerating the flesh and breaking a finger bone.

G. Lynch-Staunton, K.C., and F. W. Griffiths, Niagara Falls, for plaintiff.

T. D. Cowper, K.C., for defendant.

FALCONBRIDGE, C.J.—Two or three acquaintances of defendant were amusing themselves one afternoon in June last, by standing on the sidewalk on a public street in the village of Niagara Falls, and throwing or "putting" an iron ball or shot weighing about 23 pounds, across the road. They were able to "put" the ball some 30 odd feet before it would reach the ground; then the ball would naturally continue its course across the remainder of the street and the boulevard and sidewalk. There was no sharp or perpendicular kerb at the boulevard, but only a gentle rise of ground from the travelled highway to the further limit of the street, which was about 60 feet wide. The plaintiff was one of the usual attendant crowd of small boys, of whom there were eight or ten present, and these boys, as soon as the ball would strike the ground, would run to field or stop it, and bring it back to the men. The defendant came along and engaged in the pastime, putting or throwing two or three balls, the last of which, while the plaintiff was endeavouring to stop it, crushed and lacerated his

finger against a hydrant. A man named Cook was standing on the east or further side of the road to see how far the different competitors would throw the ball, and he swore that he warned the boys more than once to keep away or they would get hurt. But he did not drive the boys away or otherwise prevent their touching the ball.

It was plain upon the evidence, notwithstanding the warning which Cook said he gave, that the boys were permitted, if not encouraged, to stop and bring back the ball to the players. The plaintiff denied having heard any warning from Cook, and said that the other men asked the boys to stop the ball. The plaintiff is a bright boy of ten. He is of sufficient age and discretion to be capable of some care of his own safety, but, having regard to the degree of capacity of which he is possessed, to the natural curiosity and officiousness of a boy, and to the surrounding circumstances, I find him not guilty of contributory negligence. I find the defendant guilty of negligence causing the accident. It was negligent and improper of him to indulge in such a pastime on the public street, and to encourage or allow a small boy, who was lawfully thereon, to meddle with the ball.

I refer to *Smith v. Hayes*, 29 O. R. 292; *McShane v. Toronto, Hamilton, and Buffalo R. W. Co.*, 31 O. R. 186; *Ricketts v. Village of Markdale*, 31 O. R. 628; *American and English Encyc. of Law*, 2nd ed., vol. 7, p. 409; *Merritt v. Hepenstal*, 25 S. C. R. 150; *Jewson v. Gatti*, 2 Times L. R. 441; *Powers v. Harlow*, 53 Mich. 507, 51 Am. R. 154; and article on the "Allurements of Infants," 31 Am. Law Review, p. 891.

Judgment for plaintiff for \$175 and County Court costs, without any set-off of costs by defendant. Money to be paid into Court or to the official guardian, to be paid out to, or for the benefit of, the infant plaintiff by or under the discretion of the official guardian.

MEREDITH, C.J.

OCTOBER 24TH, 1902.

CHAMBERS.

HARRIS v. HARRIS.

Pleading—Statement of Claim—Action for Declaratory Judgment—Statement of Reasons for Seeking Relief—Embarrassment.

An appeal by plaintiff from the order of the Master in Chambers (ante 684) striking out paragraphs 6, 7, 8, and 10 of the statement of claim.

The plaintiff alleged a lawful marriage and asked a declaration of validity of it, on the ground that in an action in the High Court, to which she was not a party, it had been determined that the marriage was not lawful. The Master

held that the setting out in the statement of claim of the reasons for which she asked to have her marriage declared lawful was embarrassing, and struck out certain clauses.

H. M. Mowat, K.C., for plaintiff.

D. L. McCarthy, for defendant Elizabeth Harris.

MEREDITH, C.J., said that he could not conceive what good purpose was served by making such an application as this; there would be no embarrassment in having these clauses on the record, and no additional expense would be occasioned except by this application; the Master dealt with the matter on a wrong principle; there is nothing improper in the plaintiff putting upon the record a statement of the reasons why she has come to the Court seeking a declaratory judgment without any consequential relief.

Appeal allowed, and motion dismissed. Costs here and below to be costs in the cause.

NOVEMBER 15TH, 1902.

DIVISIONAL COURT.

KELLY v. POLLOCK.

*Pledge — Bailment of Animal — Pasturage — Subsequent Advances—
Distinction between Pledge and Chattel Mortgage.*

Appeal by Kelly, the judgment creditor, from a decision of the Judge presiding in the 1st Division Court in the county of Lambton in favour of the claimant, McGregor, in an interpleader issue, and from the Judge's order refusing a new trial. The appellant under an execution against the judgment debtor, Pollock, had seized a mare called "Pigeon" and her foal, and another mare called "Silver," all in the possession of McGregor, who claimed to be entitled to hold them as against the judgment creditor. The Judge below decided in favour of the claimant as to all the goods in question, holding that there was a valid pledge of them to the claimant by the judgment debtor.

J. H. Moss, for appellant.

D. L. McCarthy, for claimant.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.:—The appellant abandoned upon the argument his claim to "Pigeon" and her foal and insisted only on his claim to "Silver." The facts were, that the judgment debtor placed "Silver" with the claimant to be pastured at a fixed price per month, for which it was agreed that

the claimant should be entitled to hold her. After some months the judgment debtor obtained an accommodation note for \$60 from the claimant upon the understanding that he was to hold the mare as security for the payment of the note as well as of the pasturage, and with the further express understanding that if the claimant should be called on to pay the note, the mare was to be his.

The distinction between a mortgage and a pledge of chattel property is well recognized: *Ex p. Hubbard*, 17 Q. B. D. 690; *Hilton v. Tucker*, 39 Ch. D. 669. The essential distinction is, that in a mortgage there is a transfer of the property, but not necessarily of the possession; in a pledge, the possession must pass, but there is no transfer of the property in the goods; if both the property and the possession pass, the transaction is a mortgage: *Story's Eq. Jur.*, sec. 1030.

In this case there was no idea in the original transaction as to the pasturage that the property in the mare should pass, but only the possession, and the transaction with regard to the note did not involve any change in this respect. The stipulation as to the change of ownership in the event of default in payment of the note affords quite as strong an argument in favour of the view that the entire ownership was to remain in the judgment debtor meantime, as of any other deduction which might be drawn from it. The transactions between the judgment debtor and the claimant took place at a period sufficiently long before the judgment creditor's rights were brought into question, to do away with any suspicion of a lack of good faith. The Judge below was correct in holding the transaction to have been one of pledge.

Appeal dismissed with costs.

NOVEMBER 15TH, 1902.

DIVISIONAL COURT.

BIRNEY v. TORONTO MILK CO.

Company—Hiring of Manager—Company not Going into Operation—Absence of By-law or Contract under Seal—Claim for Payment for Services—Appointment of Director as Manager—Salary—Necessity for Confirmation by Shareholders.

Appeal by defendants from judgment of LOUNT, J., who tried the action without a jury at Toronto, in favour of plaintiff for \$495 and costs, the amount claimed by plaintiff for salary as manager of defendants' business for the first 18 weeks. The defendants denied any contract binding upon them. The company never went into operation, but plaintiff alleged that he subscribed for \$12,000 of the stock of the company

and that it was paid up by commission for his services, and that he earned his salary as manager by his efforts to induce certain milkmen to go upon the board and to advance the money necessary to enable the company to begin business.

The appeal was heard by a Divisional Court composed of STREET, J., BRITTON, J.

J. B. O'Brian, for defendants.

J. M. Godfrey, for plaintiff.

STREET, J.:—The plaintiff is not entitled to recover upon a contract with the company, because no by-law for his appointment as manager of the company was passed, and no contract was made with him under the seal of the company. The Ontario Companies Act, R. S. O. 1897 ch. 191, sec. 47, contemplates that such appointment should be made by by-law, and, apart from the statute, whatever latitude may be allowed to trading corporations in the manner of appointment of mere servants, or in the case of casual or temporary hirings, appointments of an important character, such as that of the manager of a company, in order to be binding must be under seal: *Re Ontario Express Co.*, 25 O. R. 587; *Tunstun v. Imperial Gaslight Co.*, 3 B. & Ad. 125, 132; *Church v. Imperial Gas. Co.*, 6 A. & E. 861; *Young v. Leamington*, 8 App. Cas. 517; *Lindley on Companies*, 6th ed., p. 269 *et seq.*

The plaintiff is further prevented from recovering by the effect of sec. 48 of R. S. O. ch. 191, which requires a by-law for the payment of a director—and plaintiff was a director—to be confirmed by a general meeting. This section requires the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves, whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company. . . . The section should be given a broad and wholesome interpretation, and should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting. *Dictum* in *Re Ontario Express Co.*, *supra*, as to this, not followed.

BRITTON, J.:—There was no properly authorized contract under the seal of the corporation, and this is not a case in which plaintiff can succeed upon an executed consideration. The plaintiff as promoter was endeavouring to enable the company to become a going concern. That was all he

did, and for this he received the paid-up stock. The company never was in a position to require the services of a manager, and plaintiff knew this. Until the company was ready to buy, sell, and deal in milk, there was to be no actual hiring of plaintiff.

Appeal allowed with costs and action dismissed with costs.

BOYD, C.

NOVEMBER 17TH, 1902.

TRIAL.

FARLEY v. SANSON.

Landlord and Tenant—Lease—Renewal—Arbitration—Lessee—Naming Arbitrator under Protest—Landlord Appointing Sole Arbitrator.

Action by the lessee under a lease from defendants, the Rector and Wardens of Trinity Church, Toronto, for a declaration that plaintiff is not obliged to take a renewal of the lease, and to restrain defendants from proceeding with an arbitration by a sole arbitrator.

Delamere, K.C., for plaintiff.

A. E. O'Meara, for defendants.

BOYD, C.:—The plaintiff contended that there was no right to arbitrate as to the new lease on account of the conduct of the lessors, and was unwilling to arbitrate till this was determined. The defendants, however, urged on the preliminaries for the purpose of having arbitrators appointed, and to this plaintiff responded by naming an arbitrator under protest so as to save his rights in regard to his contention. This nomination defendants refused to accept and proceeded to appoint a sole arbitrator, proceeding as if plaintiff had made no appointment. In my opinion the defendants had no power to appoint a sole arbitrator, and the Court had jurisdiction to restrain the prosecution of the matter by the sole arbitrator. The arbitration might have proceeded in the ordinary form of three arbitrators, notwithstanding the protest of the plaintiff, who might at the end have had the benefit of his legal objection: *Ringland v. Lowndes*, 17 C. B. N. S. 514; *Direct Cable Co. v. Dominion Telegraph Co.*, 28 Gr. 648; *Kills v. Moore*, [1895] 1 Q. B. 252; *North London v. Great Northern R. W. Co.*, 11 Q. B. D. 30; *Beddow v. Beddow*, 9 Ch. D. 89; *Farrar v. Cooper*, 44 Ch. D. at p. 327.

Judgment declaring that plaintiff is obliged to take a renewal of the lease and restraining defendants from proceeding before the sole arbitrator. No costs.

MACMAHON, J.

NOVEMBER 18TH, 1902.

CHAMBERS.

RE MCKENZIE.

Will—Construction—Annuities—Setting apart Fund for—Deficiency of Income — Encroaching on Principal — Rights of Residuary Legatees.

Motion by way of originating notice under Rule 938, by Catharine McKenzie and Isabella Henderson, annuitants under the will of William McKenzie, who died on 3rd January, 1894, at the village of Morrisburg, having made his will on the 6th September, 1893, for a summary order declaring the construction of the will.

The testator made specific bequests of money and personal property to relatives and friends, and also devised certain lands in fee to his brother James, to his sisters Isabella Henderson and Janet McKenzie, and to his nephew James McKenzie. Then, after devising to his sister Janet a life estate in part of the west half of lot 31 in the 1st concession of Williamsburg, the testator gave the remainder in that land and all the residue of his property, real and personal, to his executors "in trust to provide means to pay the expense of administration, to pay my debts and liabilities, and to pay the bequests hereinafter made . . . to deposit at interest . . . or invest . . . any balance that may be on hand at any time to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each of my sisters, Janet, Margaret, Isabella, and Catharine, \$250 a year, or if there be not so much available in any year, then to divide equally between them what may be available, and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than to the others, and a greater sum than \$250, as in the opinion of the executors may be fit. After sufficient funds have been invested to keep up the payments to my sisters as aforesaid, then the executors to pay . . . (certain legacies) . . . And to pay to the children of my brother James McKenzie whatever may remain of the estate, share and share alike, and so that the child or children of such as may be dead will take his, her, or their parent's share." Janet died in 1897 and Margaret in 1901. The testator's brother James died on 15th March, 1902, leaving six children, who were all of age and the only residuary legatees under the will. The estate was valued for probate at \$81,127.43. After providing for prior bequests, the income of the estate was not sufficient to pay the applicants \$250 a year each.

A. H. Marsh, K.C., for the applicants, contended that the capital should be applied to make up the deficiency.

E. D. Armour, K.C., for the residuary legatees and others.

J. R. Meredith, for the executors.

MACMAHON, J.:—The language of that part of the will providing for the creation of a fund to meet the annuities indicates that the testator intended that the whole fund so created should be available to pay the annuities. The fund out of which the yearly payments are to be made is a fund directed to be formed from the various sources specified in the will. There is no direction that the annuities are to be paid out of the income derived from the fund. But, even had such a direction been contained in the will, it would not have deprived the annuitants of the right to resort to the corpus to meet any deficiency in the annuities: *Mason v. Robinson*, 8 Ch. D. 411; *Illesley v. Randall*, 50 L. T. 717; *Birch v. Sherratt*, L. R. 2 Ch. at p. 649; *Carmichael v. Gee*, 5 App. Cas. 588; *Jones v. Jones*, 18 Gr. 317.

Order made declaring that the applicants, Isabella Henderson and Catharine McKenzie, are entitled to be paid the annuities of \$250 each and arrears by payment out of the corpus of the testator's death, and that any balance of their annuities remaining unpaid at the death of Janet and Margaret respectively should be paid to their personal representatives. Costs of all parties out of the estate; those of the executors as between solicitor and client.

BOYD, C.

NOVEMBER 18TH, 1902.

TRIAL.

HIME v. TOWN OF TORONTO JUNCTION.

Assessment and Taxes—Action to Set aside Tax Sale—Prior Tax Sale—Purchase by Municipality—Lien—Redemption—Costs—Interest.

Action to set aside a tax sale.

J. B. Clarke, K.C., and C. Swabey, for plaintiffs.

W. E. Raney, for defendant corporation.

A. Mills and G. Grant, for the other defendants.

BOYD, C.—No question arose as to the validity of the sale as against defendants, for the purchasers were willing to forego all claims on being recouped the amounts paid by them at the tax sale. There was a sale de facto, and there was a legal assessment for the years 1898, 1899, 1900, in respect of which the sale now under consideration was had. True, the town had under the statute, R. S. O. ch. 224, sec. 183,

become purchaser of the lots in question for prior taxes, for which the earlier sale was held, in respect of the taxes up to 1897; but the time for redemption was current till 19th October, 1900, and no title was in fact vested by conveyance in the town till 9th April, 1901. So that it was competent for the tax officers to assess taxes validly on these lots for the years 1898-1900: sec. 192. These lots were not exempt under the statute when the assessments were made in the years 1898-1900; at the outside the lots did not belong to the town till after 15th October, 1900, before which that year's taxes had been imposed. There is no valid reason why the purchasers should not have the full benefit of sec. 218 of the Act, which, being read with sec. 222, declares that anyone who purchases at any sale under colour of any statute authorizing sales of land for taxes in arrear shall have a lien on the lands for the purchase money paid and interest, to be enforced against the lands. As against plaintiffs, that is the measure of relief to which all the tax purchasers are entitled.

Judgment for payment of that amount, with interest at ten per cent. and costs of suit, to be paid within a month; otherwise to be realized out of the sale of the lots respectively according to the amount chargeable on each as to each purchaser. No costs to be taxed as to those purchasers who are noted in default.

The proper construction of the agreement and dealings between plaintiffs and the town corporation does not require the latter to intervene for the purpose of paying these taxes and saving plaintiffs harmless therefrom.

Action dismissed with costs to the defendant town corporation.

BOYD, C.

NOVEMBER 19TH, 1902.

CHAMBERS.

RE PHELAN.

Will—Devise—Restraint on Alienation—Validity—Case Stated—Reference to Divisional Court—Res Judicata.

Case stated by the Master of Titles. The question arose upon the will of D. T. O'Sullivan, which, after devising certain lands to his nephews, provided that: "Neither of my said nephews is to be at liberty to sell his half of the said property to anyone except to persons of the name of O'Sullivan in my own family. This condition to attach to every purchase of the said property." Ellen Phelan, a married sister of one of the nephews (both O'Sullivans), applied to be registered as owner of the lands under the Land Titles Act.

The Master asked whether the provision in the will was valid, and if not, whether the applicant was entitled to be registered as owner free from the condition.

W. A. Skeans, for the applicant.

F. W. Harcourt, for infants interested.

BOYD, C.—In my opinion, the restriction attempted to be imposed by the testator on the power of alienation is void, but, owing to the contrary decision in *O'Sullivan v. Phelan*, 17 O. R. 730, effect can not be given to this judgment, and the question must be referred to a Divisional Court. I express no opinion as to whether or not the question is res judicata.

BOYD, C.

NOVEMBER 19TH, 1902.

TRIAL.

SWAYZIE v. TOWNSHIP OF MONTAGUE.

Municipal Corporation—Drainage—Flooding Private Lands—Culvert—Increase in Rapidity of Flow of Water—Cause of Action.

Action for damages to the plaintiff's land and crops by flooding, alleged by him to have been caused by the defendants making a junction of two drains, known as the Carroll and Guthrie drains.

BOYD, C.—There was in fact no junction. The only act of the defendants which could have given the plaintiff a right to recover against them was the putting in of a new culvert at a place where there had previously been a means of escape for water, and one was necessary. The water found its way from the Carroll drain into a swamp and thence into the Guthrie drain, and the only effect of the culvert was that, by increasing the rapidity, though not the volume, of the flow, the amount of water in the swamp was increased for a few days. As to the damage resulting from this increased rapidity of flow, there was no evidence. For any damage caused by the Guthrie drain the defendants were not liable.

Action dismissed with costs.

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STREET, J.

NOVEMBER 21ST, 1902.

TRIAL.

BLACK v. IMPERIAL BOOK CO.

Copyright—Infringement — Importation of Foreign Reprints — Title of Plaintiffs—License—Notice to Customs Authorities—Insufficiency of.

Action to restrain defendants from infringing plaintiffs' copyright in the 9th edition of the *Encyclopædia Britannica* by the importation by defendants into Canada of copies of the work printed in the United States. The defendants set up that the copyright had been assigned by plaintiffs to the Clarke Co., and that, as this assignment had not been registered at Stationers' Hall, neither plaintiffs nor the Clarke Co. had a right to sue.

Walter Barwick, K.C., and J. H. Moss, for plaintiffs.

S. H. Blake, K.C., for defendant company.

A. Mills, for defendant Hales.

STREET, J.—The agreement with the Clarke Co. was in effect a mere license to publish the work in question for a period which would expire before the expiry of the copyright, and, as there was no assignment of the copyright itself, the plaintiffs had proved a sufficient title.

The defendants also set up that no notice had been given to the customs authorities under sec. 152 of the Imperial Customs Act of 1876 (39 & 40 Vict. ch. 36). This section must be read along with the 17th section of the Imperial Copyright Act of 1842, and must be construed as making it necessary that, before there can be an unlawful importation of a copyright work, notice shall have been given to the Customs shewing the name of the work, the owners of the copyright, and the date of its expiration. The notice of which proof was here offered, which correctly set out the name of the book and the owners of the copyright, but incorrectly stated the date of the expiry of the copyright, as the 30th

January, 1924, instead of 29th or 30th January, 1917, was insufficient under the section referred to, and the plaintiffs, therefore, had no right which they could enforce with respect to imported reprints.

Action dismissed with costs.

BRITTON, J.

NOVEMBER 24TH, 1902

WEEKLY COURT.

RE GRIMSHAW AND GRIMSHAW.

Arbitration and Award—Arbitrators not Taking down Evidence in Writing—Objection not Raised—Findings of Arbitrators—Errors—Setting aside Award—Costs—Uncertainty.

Application by Delos Grimshaw to set aside an award whereby the arbitrators between the parties found \$145 due from the applicant to Coleman Grimshaw in respect of produce and on other accounts.

BRITTON, J., held, (1) that, as no objection had been made upon the arbitration to the incomplete taking down of the evidence in writing, none was open now; (2) that the arbitrators were clearly wrong in not allowing the applicant \$192.73 received by Coleman Grimshaw from the sale of some hay and oats replevied by him from the applicant; (3) that, upon the evidence so far before them, they were wrong in allowing \$50 for straw in favour of Coleman Grimshaw; and (4) that the award was too vague and uncertain as to costs.

Award set aside and all these matters remitted to the arbitrators for reconsideration; costs of this application (fixed at \$25) to be paid by Coleman Grimshaw.

BOYD, C.

NOVEMBER 24TH, 1902.

WEEKLY COURT.

RE CORBETT AND HARTIN.

Will—Devise—Description of Land—Statute of Frauds—Identifying Land—Restraint on Alienation—Invalidity—Repugnancy.

Application under the Vendors and Purchasers Act. The testator devised the land in question in these terms: "To my brother Patrick all that lot of land in the township of Goulbourn . . . being the east half of lot number 27 in the said township, and to the heirs of his body lawfully

begotten, subject to a charge of £40 to be paid to my brother Nelson in instalments, the first instalment to be payable one year after my said brother Patrick shall take possession of the said lands, which shall not be till three years after my decease, my father retaining possession of the said land during the said term for his own benefit. . . . And I further direct that the said lot shall at no time ever be mortgaged, sold, or let, and that if my brother Patrick should die without issue lawfully begotten, the said lands shall descend to my next younger brother and his heirs as aforesaid."

BOYD, C., held, first, that the words of description in the will, which did not include any mention of the concession, were not per se sufficient to operate as a devise of the lands; and that, as the ambiguity was patent, to admit parol evidence of the intention of the testator, in order to identify the lands, would be to go in the teeth of the Statute of Frauds. But held, also, that looking at the provision giving the testator's father the benefit of the land for a term of three years, and the undisputed evidence of the fact that testator's father had after testator's death worked lot 27 in the 10th concession of Goulbourn jointly with his son Patrick until the latter died, aged 22, in 1848, there was no difficulty in finding that the will carried the land to the beneficiary named therein.

Held, on the second point, that the clause restricting alienation was not operative, since it expressly referred only to the first devise to Patrick, and since, even if it were to be read as applicable as well to the devise to Nelson, Patrick's younger brother, the present vendor, then the point was covered by *Re Thomas and Shannon*, 30 O. R. 51, and that the restrictive clause must, therefore, be held void as repugnant to the nature of the estate devised.

Order declaring in favour of the title.

NOVEMBER 24TH, 1902.

C. A.

DAVIS v. WALKER.

Donatio Mortis Causa — Solicitor — Lack of Independent Advice — Action against Administrator — Want of Corroborator — Burden of Proof — Costs.

An appeal by plaintiff from judgment of FALCONBRIDGE, C.J., ante 3, dismissing the action.

The defendant was administrator of the estate of Betsy Ann Walker, who died on the 28th February, 1900, intestate and without children.

The plaintiff sued to recover from the estate of the deceased a sum of \$1,500, representing the amount of certain bank deposits and of sums due to the deceased upon a mortgage and under an agreement for sale of a parcel of land. The plaintiff asserted that on the day before her death the deceased gave him the bank book, mortgage, and agreement, and that they were received by him as a *donatio mortis causa*.

- The Chief Justice found that at the time in question the plaintiff was the solicitor of the deceased; and held that, having relation to that fact and the circumstances under which the alleged gift was made, it was not valid. At the time when the gift was made the deceased and plaintiff were alone; there had been no previous intimation to plaintiff or any one else of an intention to make the gift, no other or disinterested person was called in, and no advice or explanation as to the nature and effect of the proposed gift was given by plaintiff or any one else.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A.

T. Langton, K.C., and W. R. Riddell, K.C., for appellant.
E. S. Wigle, Windsor, for defendant.

Moss, J.A.—In my opinion, the judgment appealed from is right and should be affirmed. The evidence makes it clear that for many years before the transaction in question and down to the day on which it took place, the plaintiff was the trusted solicitor and business adviser of the deceased, and that the relation had never been severed. The transaction took place, therefore, during the subsistence in its fullest influence of the relation of solicitor and client. The handing over to the plaintiff of the sum of \$1,500, or the placing him in possession of documents or indicia of title which would enable him to receive that sum, was an act of bounty on the part of the deceased, and none the less so because it was made with the intention, to borrow the expression of Lord Russell of Killowen, C.J., in *Cain v. Moon*, [1896] 2 Q. B. 283. “that it should revert to the donor in case of her recovery.”

The rule of law with regard to gifts by clients to their solicitors, is much stricter than the rule with regard to other dealings between them, and it has been so from an early period. In *Tomson v. Judge*, 3 Drew. 306, Vice-Chancellor Kindersley, at p. 314, pointed out the difference between a gift and a purchase. . . . In *O'Brien v. Lewis*, 4 Giff. 221, Sir John Stuart, V.-C., expressed the rule in substantially similar terms, and his decision was affirmed by Lord Westbury, 32 L. J. Ch. 572.

While the relation exists, so long as it remains unsevered either by the solicitor having ceased to hold the position of or to act as solicitor for the donor, or possibly by the intervention of other and wholly independent advisers as to the nature and effect of the particular transaction, a solicitor cannot validly accept a bounty from his client. In *Morgan v. Minet*, 6 Ch. D. 638, Vice-Chancellor Bacon states the matter at p. 646-7. . . .

I see no reason why the rule should not apply to a *donatio mortis causa*, as much as to a gift *inter vivos*. It is not necessary to determine whether *Walsh v. Studdart*, 4 Dr. & War. 159, 2 C. & L. 423, was a case of *donatio mortis causa* or of gift *inter vivos*. The remarks of Sir E. Sugden as to the duty of a solicitor receiving a present from his client have a bearing upon the point. See especially p. 428 of the last mentioned report. The rule has been held to apply so as to exclude the ordinary presumption of a gift to a son being an advancement in a case where the son was also the solicitor of his parent: *Garrett v. Wilkinson*, 2 DeG. & S. 244. If there is to be any difference, and the case of a *donatio mortis causa* is to be likened to the case of a provision in favour of a solicitor contained in a will drawn by himself or under his instructions, then it lies upon the solicitor claiming the benefit to remove all suspicion, and to prove affirmatively that the donor was fully aware of the nature and effect of the gift, and with such knowledge approved of what was being done. In this case, if all that the plaintiff states occurred between him and the deceased had been written down by him and signed by her, the production of that paper would not have been sufficient to establish the plaintiff's case.

There is an entire absence of evidence to shew that the nature of the transaction was explained, or that the usual precautions for making sure that she fully understood what she was doing, and its effect with regard to the property she was dealing with, were adopted: *Tyrrell v. Painton*, [1894] P. 151.

I think the plaintiff has failed to establish a case for the relief he seeks.

The defendant claims by way of cross-appeal to vary the judgment of the learned Chief Justice by directing the plaintiff to pay the defendant's costs of the action, but I think no case has been shewn for interfering with the discretion exercised.

The appeal and cross-appeal should be dismissed.

GARROW, J.A., concurred in the judgment of Moss, J.A.

OSLER, J.A.—I think the appeal must be dismissed. I rest my judgment on the ground that the plaintiff's testimony has not been corroborated as required by sec. 10 of the Evidence Act, R. S. O. 1897 ch. 73. . . .

MACLENNAN, J.A.—If the gift in question were claimed as absolute, and not one *causa mortis*, and therefore revocable, the case of *Walsh v. Studdart*, 4 Dr. & War. 171, on which the Chief Justice rested his judgment, would be conclusive. It was not a case of *donatio mortis causa* at all, although indexed as such in the report, and treated as such in 1 W. & T. L. C. 406, 413. [Discussion of that case.]

* * * * *

A *donatio mortis causa* being revocable *ab initio*, and being conditional upon the death of the donor, resembles a legacy in most respects, and the equities applicable cannot be different. I, therefore, think that the law applicable to wills is that which is to be applied to such gifts, and not that which is applicable to gifts *inter vivos*. [*Collins v. Kilroy*, 1 O. L. R. 503, referred to.] It was there pointed out that a person standing in a fiduciary relation may lawfully exert his influence to obtain a legacy, and unless there has been something amounting to coercion or fraud, such legacy is good: *Huguenin v. Basely*, 1 W. & T. L. C., 7th ed., p. 287, and cases there cited; *Kerr on Fraud*, 3rd ed., pp. 274-9. Nothing of the kind has been proved here. There is, however, the other rule stated by Lord Hatherley in *Fulton v. Andrew*, L. R. 7 H. L. 471, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, has thrown upon him the onus of shewing the righteousness of the transaction. If the plaintiff is to be regarded as having been instrumental in procuring this donation, then I think he has discharged that onus. . . . If it is proved, as I think it is, that the donor and the plaintiff and his family had for a long time been intimate friends, that she had for some time an intention of giving him her property at her death, that without any request or solicitation on his part she came to his house, and while there made these gifts to him in the manner he has described, I think the plaintiff has shewn, that the transaction was righteous, and that it is valid.

I therefore think the appeal should be allowed with costs, and that there should be judgment for the plaintiff with costs.

Appeal dismissed with costs; MACLENNAN, J.A., diss.

NOVEMBER 24TH, 1902.

C. A.

KEITH v. OTTAWA AND NEW YORK R. W. CO.

Railway—Injury to Passenger—Alighting from Moving Car—Negligence—Contributory Negligence—Findings of Jury—Damages.

Appeal by defendants from judgment of MACMAHON, J., ante 104, in favour of plaintiff upon the findings of the jury in an action for damages for injuries sustained by plaintiff in endeavouring to get off a train of defendants as it was moving out of the station.

The questions and answers of the jury were as follows: (1) How long did the train stop at Finch station? A.—Cannot say. (2) Was the time the train remained there sufficient to enable plaintiff to alight? A.—No. (3) Was Keith aware when he reached the platform of the car that the train was in motion? A.—Yes. (4) If Keith was guilty of any negligence which contributed to the accident, what was such negligence? A.—None. (5) If Keith is entitled to recover, at what do you assess the damages? A.—\$1,000.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A.

W. R. Riddell, K.C., and W. H. Curle, Ottawa, for appellants, contended that the trial Judge should have nonsuited, on the ground that the act of alighting from a moving train was in itself negligence on the part of the plaintiff which relieved defendants from liability for damages, in the absence of circumstances tending to excuse or justify the act, and that if defendants were guilty of negligence in not stopping the train for a sufficient time to allow plaintiff to alight, the damages claimed were too remote. They also contended that upon the evidence the jury should have found that the train was stopped for a sufficient time to enable plaintiff to alight, and have found plaintiff guilty of contributory negligence. They submitted further that the learned Judge should not have entered judgment for plaintiff in face of the jury's answers that they could not say how long the train was stopped, and that the damages were excessive.

W. H. Blake, K.C., for plaintiff, contra.

Moss, J.A.—I think the learned Judge properly declined to withdraw the case from the jury. I do not understand the defendants' proposition to go the length that under no circumstances and in no case is a person justified in alighting from a moving train, but that presumptively it is an act of

negligence, and if any injury result from it the party suffering the injury cannot recover damages without shewing circumstances tending to excuse or justify the act. I am disposed to think that the rule of conduct as stated by the defendants is not strictly accurate, but, if it be the rule, then it must follow that when circumstances are stated it is for the jury to consider and determine as to their sufficiency. In this case there were circumstances stated which could not have been withdrawn from the jury. And it was for the jury to say upon the evidence whether the plaintiff's injuries were caused by the negligence of the defendants or were the result of his own carelessness and negligence. Upon the motion for nonsuit the question for the learned Judge was whether, assuming, as for the purposes of the motion for nonsuit it was to be assumed, that the defendants were negligent in not stopping their train for a sufficient time to enable the plaintiff to alight, there was evidence upon which the jury might find that the injury was the result of that negligence and was not occasioned by the plaintiff's own negligent and imprudent act in attempting to alight while the train was in motion. And if the jury could reasonably find in favour of the plaintiff on this question, the damages would not be too remote. The nonsuit was, therefore, rightly refused. There was evidence upon which the jury might find, as they did, that the train was not stopped for a sufficient time to enable the plaintiff to alight. The jury having so found, a case for negligence has been established against the defendants. To relieve themselves of liability for such negligence, they were obliged to shew that it did not contribute to the plaintiff's injury. The next inquiry, therefore, is, whether the learned trial Judge properly submitted the question of the plaintiff's conduct to the jury, and whether there was evidence to support their finding. The point to be determined by the jury was whether the plaintiff acted in a reasonable and prudent manner in endeavouring to alight from the car, while it was moving at the rate spoken of in the evidence. The question involved consideration of the circumstances. Finch station was the plaintiff's point of destination on the defendants' line. The train was leaving it without his having been afforded a proper opportunity of alighting. It was for the jury to consider and say whether, taking into consideration the plaintiff's position when the train began to move, the speed it had attained, the point it had reached before he got on the step, the place on which he could alight, the effect upon his movements of the bundle or parcel which he carried, and the other circumstances, the plaintiff was guilty of negligence in attempting to alight.

The question was not given to the jury in this form. But the question actually put must be read in connection with the charge. The learned Judge explained to the jury that if the defendants did not stop the train for a sufficient time to enable the plaintiff to alight, or did not afford him proper facilities for alighting before the train was started, they were guilty of negligence. He then adverted to the starting of the train, the plaintiff's position in the car at that time, his carrying a bundle in one hand, and the speed of the train when he reached the platform, and told them that it was for them to say whether he acted reasonably under the circumstances appearing in evidence. Substantially he left to the jury to say whether the plaintiff was in fault at all. The question he gave was: "If Keith was guilty of any negligence which contributed to the accident, what was such negligence?" The answer of the jury was that the plaintiff was guilty of no negligence which contributed to the accident. Having regard to the terms of the charge, this is a finding that the plaintiff acted reasonably and was not in fault. There is evidence upon which the jury might properly come to this conclusion, and judgment was, therefore, properly entered for the plaintiff. In view of the finding that the train was not stopped a sufficient time to enable the plaintiff to alight, the question as to the exact time was immaterial. If they had found it, they would still have been obliged to say whether it was sufficient.

Complaint was also made that the damages were excessive. The plaintiff's injury was of a very painful kind. The question of the period within which he might have fully recovered was complicated to some extent by another accident he met with between five and six weeks afterwards, resulting in a fracture of the leg previously injured or affected.

But the jury were carefully cautioned not to take that into consideration, and to confine their award of damages to the injury sustained at Finch, and it must be assumed that they have done so. There was evidence that at the time of the trial, rather more than a year after the accident, he was still suffering from its effects.

The amount awarded is not so large as to suggest any mistake, misapprehension, or prejudice on the part of the jury.

The appeal should be dismissed.

OSLER, J.A., gave reasons in writing for coming to the same conclusions, and referred to the following authorities: Beach on Contributory Negligence, 3rd ed., sec. 147; American Negligence Cases, vol. 4; Clayards v. Dethick, 12 Q. B.

439; Pollock on Torts, 4th ed., p. 433; Connell v. Town of Prescott, 20 A. R. 49, 22 S. C. R. 147; Edgar v. Northern R. W. Co., 11 A. R. 452; Filer v. New York Central R. R. Co., 49 N. Y. 47; Central R. R. Co. v. Miles, 88 Ala.

MACLENNAN and GARROW, JJ.A., concurred.

NOVEMBER 24TH, 1902.

C. A.

McCLENAGHAN v. PERKINS.

Executors and Administrators—Claim by Executor against Estate—Corroboration—Payment in Lifetime of Testator—Admission—Executor's Compensation—Devise, whether in Lieu of—Construction of Will—Grounds for Depriving Executor of Compensation—Negligence—Mismanagement—Breaches of Trust.

An appeal by defendant Perkins from an order of FALCONBRIDGE, J., in Court, ante 191, dismissing that defendant's appeal from the report of the Master at Ottawa and allowing in part a cross-appeal by the plaintiff. The report was made upon a consent reference to take the accounts in an action for administration of the estates of V. E. Hinton, deceased, and M. S. McGillivray, deceased. The Chief Justice affirmed the Master's findings except in one particular, viz., as to compensation to the defendant Perkins as executor, which he disallowed.

The appeal was heard by OSLER, MACLENNAN, MOSS, and GARROW, JJ.A.

T. A. Beament, Ottawa, for appellant.

W. J. Code, Ottawa, for respondents.

MACLENNAN, J.A.—The first item in question in this appeal is one of \$1,275. The precise form in which this and other items were stated in the appellant's account in the administration proceedings of his father's estate in *Armstrong v. Perkins* is not before us, although it was before the Master. What the Master says about it is this: "In the accounts filed in *Armstrong v. Perkins* there is an item of \$1,200 credited as paid by the estate of Victoria Elizabeth Hinton on the 30th April, 1883." At that time the appellant was passing his accounts as executor of his father, Lyman Perkins, and he was at the same time executor of his sister Mrs. Hinton, who had died on the 25th December, 1882. It seems to have been assumed by all parties that the item of \$1,200 was allowed to the appellant as executor of his father. On taking the present accounts, and on being surcharged with the item

of \$1,275, he explained it by saying the money was not received on the 30th April, 1883, but was made up of several smaller payments made by him as executor of his father to his sister Mrs. Hinton, in her lifetime, in the year 1882. The Master has not given effect to that evidence, and has charged the appellant with the item, on the ground that his evidence was in respect of a matter occurring before the death of the deceased, and was not corroborated as required by R. S. O. ch. 73, sec. 10. The learned Chief Justice has upheld the decision of the Master.

I am, with great respect, of opinion that the Master's ruling on the question of corroboration is wrong, and cannot be supported. The question before him was whether the appellant had received the sum in question on the 30th April, 1883, or at any time after Mrs. Hinton's death. If he did, he was chargeable, but not otherwise. To my mind, the matter is too plain for argument. The respondents say to the executor: "You received this sum of \$1,200 or \$1,275 on or about the 30th April, 1883, or at all events some time after Mrs. Hinton's death, and after you became her executor; and that is apparent from your own admission in your account filed in *Armstrong v. Perkins*." He answers that by a denial. He says: "That admission requires explanation and qualification. I did not receive it on the 30th April, 1883, or after my sister's death at all. It was the aggregate of several sums which I, as my father's executor, paid to my sister in her lifetime, and I claimed and obtained credit for them as my father's executor, which I was entitled to do." It was not correct to say in his account that the item had been paid to the estate of Victoria Elizabeth Hinton, or to himself as her executor, instead of saying it had been paid to her in her lifetime. But the important matter at that time was to get credit for it with his father's estate as a payment by him on account of his sister's share. Whether it was paid in her lifetime or shortly afterwards was immaterial, and the error was not an unnatural one to commit in preparing the accounts after Mrs. Hinton's death. The matter in question before the Master was, therefore, in my opinion, clearly not a "matter occurring before the death" of Mrs. Hinton, and so not one requiring corroboration under the statute. This item must be referred back to the Master for reconsideration and determination.

The second ground of appeal is the finding of the Master, on which the Chief Justice expressed no opinion, that the devise by Mrs. McGillivray of certain land to the appellant, with a direction for the payment out of her personal estate of the incumbrance thereon, was made to him in his character

of executor, and was an answer to his claim to an allowance for his care, pains, and trouble, and time expended as executor, under R. S. O. ch. 129, sec. 40. The learned Chief Justice held that the appellant's faults in the execution of his trust were sufficient to disentitle him to any compensation, and that it was not necessary to determine whether the devise was made to him in his quality of executor.

I have examined the numerous cases on this subject, and I am of opinion that on this point the Master came to a wrong conclusion.

The appellant was the testatrix's brother, and the first disposing paragraph of the will is the one in question:—"I give and devise all and singular these certain parcels or tracts of land (describing them) unto my brother G. W. Perkins, his heirs and assigns absolutely, for his and their sole and only use forever, free from all incumbrances, and I hereby direct that the mortgage at present on said lands, or any other incumbrances that may be on said lands at the time of my death, shall be paid out of my personal estate, and the payment of the said incumbrance shall be a first claim on my said personal estate." She then proceeds to dispose of the residue of her real estate and her personal estate, in a number of subsequent paragraphs, for the benefit of her nephews and nieces and other objects. She next appoints "the said G. W. Perkins sole executor" of her will, and then follows the usual clause enabling "the said trustee hereby appointed or any trustee or trustees to be appointed as hereinafter provided," in case of vacancy in the office, to appoint a successor or successors in the trust, and afterwards she gives the appellant three portraits.

Now, taking this will as a whole, I think the presumption that the devise was intended as compensation to the executor is rebutted. [*Compton v. Bloxam*, 2 Coll. 201, and *In re Appleton*, 29 Ch. D. 893, referred to.] Here, the gift is to "my brother G. W. Perkins," and I think that is an indication of the testatrix's motive for her gift, sufficient, having regard to the other parts of the will, to rebut the general presumption. See also cases cited in *Theobald on Wills*, 5th ed., p. 318; *Williams on Executors*, 9th ed., p. 1147.

I therefore think that the question of compensation to the appellant as executor of Mrs. McGillivray is not excluded by the devise contained in the will.

The next question is that of compensation. The Master allowed the appellant compensation to the amount of \$1,900 out of the estate of Mrs. Hinton, but allowed nothing out of Mrs. McGillivray's estate, for the reason already mentioned.

The learned Chief Justice held him not entitled out of either estate by reason of misconduct. He was of opinion that the appellant's acts of negligence, mismanagement, and breach of trust, made a cumulative case quite sufficient to deprive the executor of the compensation provided by the statute. The learned Chief Justice enumerates the neglects and defaults of the executor; and they are certainly not trifling, or at all to be excused. Nevertheless, they are not the neglects or defaults of a dishonest or fraudulent trustee, and are all capable of being compensated, and the losses resulting from them capable of being made good, in money. That being so, I think it is not a case for depriving him of compensation. The appellant has been trustee of the Hinton estate for nineteen years, and of the McGillivray estate for, I think, fourteen years. The aggregate amount of the money which came to his hands during that term was about \$72,000. It is evident that he must during that period have bestowed much care, pains, trouble, and time in connection with the business of both estates, and, although the care and pains were not of the highest quality, yet his position under the statute was and is that of a person performing services on terms of fair and reasonable remuneration for care, pains, trouble, and time. I think it is the effect of all the decisions on the statute that an executor or trustee is not to be deprived of compensation for actual and beneficial services, though he may also have been guilty of neglects and defaults more or less grave: *Hoover v. Wilson*, 24 A. R. 434. I think that to do so would be to punish him by depriving him of a statutory right, which the Court has no jurisdiction to do. He will be made to account for what he actually received, or must be presumed to have received, or ought to have received, but no more: *Attorney-General v. Alford*, 4 DeG. M. & G. 851; *Vyse v. Fortier*, L. R. 8 Ch. 333, L. R. 7 H. L. 318; *Ex p. Ogle*, L. R. 8 Ch. 716. The Master has charged him with all the losses to the estates resulting from his neglects and defaults, and has allowed him a compensation of \$100 per annum from the Hinton estate, which seems a moderate sum.

It follows that the executor's appeal in respect of his compensation should be allowed as to both estates, and it will be referred back to the Master to fix a proper amount in the McGillivray estate.

The appeal will be allowed with costs.

OSLER, J.A., gave reasons in writing for coming to the same conclusions.

MOSS and GARROW, JJ.A., concurred, but gave no reasons.

NOVEMBER 24TH, 1902.

C. A.

HOLMAN v. TIMES PRINTING CO.

Master and Servant—Injury to Servant—Workmen's Compensation Acts—Negligence of Master's Foreman—Infant.

An appeal by defendants from the judgment of FALCONBRIDGE, C.J., after a trial without a jury, awarding plaintiff \$1,200 damages, in an action against his employers under the Workmen's Compensation Act.

In March, 1900, plaintiff, then being about 16 years of age, went into the employment of defendants, who were the proprietors of a printing establishment in the city of Hamilton. Among other kinds of work done by them was the printing of railway coupon tickets by means of a ticket printing press. After plaintiff had been in defendants' employment for about two months, during which he did some work or "practising" at using a press, he was put to work at printing on cardboard, and he continued at this, working some hours each day, until a week before the 4th July, 1900, on which day he received the injury which was the cause of this action. The defendants had three ticket printing presses, very similar in construction and operation. Two of them were alike in every particular; the third, the one at which plaintiff was working when he was injured, differed from the others in some particulars. The plaintiff did not work at the third machine until a week before the accident. On the 27th June, 1900, he was put to work on the third machine by defendants' foreman, to print coupon tickets upon thin, slight paper, different from the stiff paper upon which he had hitherto been engaged. The quality of this paper made it more difficult to properly adjust, and called for quick action on the part of the operator, even when the machine was not working at its greatest speed. For the first few days that plaintiff was working on the machine, it was worked at first speed. On the third day, he said that the foreman told him to run at faster speed, and it was put up to second speed. On the fourth day he complained to the foreman that the speed was too great and that he was tired out and was spoiling tickets; that on account of the material being so flimsy and the speed so great it was very difficult and hard to handle it, and he could not do it; that it was dangerous to run at that speed. The foreman, however, told him to go back and run at that speed. On the next working day, he put the speed down to first speed, but the foreman came over and put it back to second. On the next day the accident hap-

pened. The plaintiff was placing a slip on the lower plate, and finding it was not entering the guides properly, he endeavoured to throw off the impression with his left hand, at the same time trying to put the slip right. The result was that his right hand was so crushed and injured as to necessitate amputation.

J. Crerar, K.C., and W. R. Riddell, K.C., for appellants.
D'Arcy Tate, Hamilton, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, J.J.A.) was delivered by

MOSS, J.A., who, after setting out the facts and evidence at length, concluded:—

If the plaintiff's right to maintain the action depended upon the claim that the foreman was incompetent to discharge the duties of foreman or superintendent, and that defendants were guilty of negligence in employing him in that capacity, I should be of opinion that the plaintiff had failed upon the facts. But upon other grounds of negligence the plaintiff is entitled to retain the judgment in his favour.

The evidence fully establishes that the plaintiff when put to work at the machine in question was, from lack of proper instruction and experience, not capable of working it properly and with safety to himself. The speed at which he was required to work it, and the difficulty of properly manipulating the impression bar, rendered it dangerous to him. He realized this after a short trial at second speed, and complained to the foreman, and informed him that he considered it dangerous, but was ordered to continue working at it and prevented from lowering the speed. The foreman admitted in evidence that he considered working at second speed with the plaintiff was too fast, because he was a little slower in picking up feeding than other boys. But he contended that the machine was not working at second speed, but only at first speed, and he said that if he had seen the plaintiff working at second speed he would have stopped him.

On the question of the speed there is not only the evidence of the plaintiff, but that of several witnesses who prove that the machine was running at second speed, and that fact must be found against the testimony of the foreman, with the consequent conclusion that he directed a boy whom he knew not to be competent or capable of doing it, to work the machine at second speed.

There is also evidence that the impression bar, though a useful contrivance, is not readily managed without a good deal of practice. The operator must learn to grasp it near

the centre, and to use his strength upon it in the right way and at the right moment, and this requires experience. It appears also to require more strength than the use of the knob.

The effect upon the plaintiff was to waste his strength and tire him out, and to make it dangerous to work at second speed, so that when the difficulty occurred about the misplaced dip, and he attempted to work the impression bar, while endeavouring with his other hand to manipulate the slip, the lower plate closed upon him before he was aware of it.

The injury was the result of the negligence of the foreman, for whose acts and orders in the premises the defendants are liable.

An attempt was made to shew that the plaintiff was in the habit of acting carelessly while at his work in looking about him and not paying attention to his task. But the evidence shews that at the moment of this accident he was wholly occupied with his work, devoting his full attention to it, and endeavouring as well as he could to perform the operations which had become necessary in the circumstances.

His youth, inexperience, lack of proper instruction, and want of necessary strength and quickness, rendered him incapable of accomplishing the operations with the requisite skill, and interfered with his withdrawing his hand in time. And there is no ground for holding that the injury was the result of his own negligence or want of proper care.

The appeal should be dismissed with costs.

NOVEMBER 24TH, 1902.

C. A.

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of Officers of Company—Railway Company—Engine-driver.

Appeal by defendants from order of a Divisional Court, ante 263, 4 O.L.R. 43, reversing order of STREET, J., ante 180, and holding that the driver of an engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident, was an officer of the railway company examinable for discovery under Rule 439, in an action against the company to recover damages for the death of the husband by negligence causing such accident.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A., BRITTON, J.

D. L. McCarthy, for appellants.

J. G. O'Donoghue, for plaintiff.

OSLER, J.A.:—Leitch v. Grand Trunk R. W. Co., 13 P. R. 369, binds us to hold, and so far as I am concerned, for the reasons there given by me, that the conductor of a railway train may be examined as an officer of defendants within the meaning of Rule 439 (1), the language of which is the same as that of the old Con. Rule 487 and R. S. O. 1877 ch. 56, sec. 156. The question now is, whether the engine driver is also an officer who may be examined. I have considered the reasons given by me in the opinion I delivered in the case cited, and, while abiding by what I said there, do not think I said anything which obliges me to hold that the engine-driver is a person on the same plane as the conductor, or possessed of the degree of authority or charge of the train which there led me to the conclusion that the latter might be regarded as an officer. He did not in fact in the present case become conductor under the rules of the company in place of the conductor whose death has given rise to the action, as a person superior in authority to both of them was then on the train and took charge of it.

The whole question of the examination for discovery of officers of a corporation is full of difficulty, which might be solved in one direction, perhaps, by treating the word "officer" as merely a synonym for "servant," and regarding these as convertible terms. This, if not actually decided, appears to be the result of the decision in the Court below, but I am not prepared to go so far as to give the former word the wide meaning contended for. There would indeed be no practical harm in doing so, were the rules as to the use which may be made of the deposition of the person examined the same as they were when Leitch's case was decided, and when such deposition could not be read against the corporation, if at all, unless the latter took part in the examination. Rule 461 (2), (3), has made a material change in the practice in this respect, and the deposition of the officer, no matter what his grade or authority, may now be read against the corporation, just as those of a natural party may be read against him under the first clause of the Rule.

I do not agree that the consequences are so unimportant or free from disadvantage to the corporation as one of my learned brothers in the Court below seems to think, and while, perhaps, it is not legitimate to construe Rule 439 (1) by looking at the consequences I have referred to under

Rule 461, I think these fully justify us in saying that we ought not to extend the meaning of the word "officer" in the former Rule or carry the cases further than they have already gone. It might be quite reasonable to examine, for discovery merely, any officer or servant of a corporation, but to allow this examination to be used as evidence against the corporation in the same way as that of a natural person may be used against himself, is a practice the justice of which, in many cases at all events, is not so clear. The plaintiff or defendant, as the case might be, could obtain everything he ought to obtain in the way of discovery if Rule 439 were enlarged so as to admit of the examination of officers and servants of the corporation, and the 2nd and 3rd clauses of Rule 461 might in that case be repealed without injustice to any one. The persons examined for discovery would then be examined, as they should be, as witnesses at the trial, while any difficulty in obtaining their evidence then would be obviated by examining them in like manner under Rules 485 and 486.

It appears to me, therefore, with all deference, that we should allow the appeal.

MOSS, J.A., gave reasons in writing for coming to the same conclusion.

GARROW, J.A., and BRITTON, J.A., concurred.

MACLENNAN, J.A., concurred, but *dubitante*.

NOVEMBER 24TH, 1902.

C. A.

TORONTO GENERAL TRUSTS CORPORATION v.
WHITE.

*Landlord and Tenant—Building Lease—Valuation of Buildings—
Arbitration and Award—Extension of Time for Making Award—
Interest.*

Appeal by defendants from an order of a Divisional Court, *ante* 198, 3 O.L.R. 519, reversing the judgment of MACMAHON, J., which was in favour of defendants upon a special case stated for the opinion of the Court in an action to recover interest upon the amount payable to the plaintiffs as executors of the will of Charles Potter, in respect of the value of buildings upon King street, east of Yonge street, in the city of Toronto. A lease to Potter of the lands on which the buildings stood expired on the 31st October, 1900, and there was no provision for renewal. A clause in the lease provided

for payment by the defendants of the value of the buildings, to be fixed by valuers. The valuers were appointed in due time, but did not make their valuation until the 30th November, 1901. The interest sued for was the interest on the sum fixed from the date of the expiry of the lease until the date of the valuation or award. The clause in question provided that the reference should be entered upon and award made within six months next preceding the 1st November, 1900, and that within six months from that date the value of the buildings should be paid, with interest at seven per cent. per annum from that date. The Court below held that the defendants were, as to the buildings, in the position of purchasers in possession, and applied the general rule (*Birch v. Joy*, 3 H. L. Cas. 565) that the purchaser pays interest from the time of taking possession.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A., counsel for both parties consenting to its being heard by four Judges instead of five.

J. Bicknell, for appellants, contended that interest would be allowed only in cases of contract therefor, or in cases where the money has been wrongfully withheld, and here, by the contract, it could not be paid until ascertained.

F. E. Hodgins, K.C., for plaintiffs, contra.

MACLENNAN, J.A. (after stating the facts):—It does not appear what the reasons were for the award not having been made within the time originally agreed upon, nor why the time was extended, and the award not made until 13 months after the expiration of the term, and we must suppose that the extension of time and delay were agreed to for the convenience of both parties and without the fault of either.

When the extension of time of the 23rd October, 1900, was agreed to, it was still possible to make the award within the time originally limited, and if that had been done the defendants would have had to pay interest at seven per cent. per annum for any delay in payment after the 1st November, 1900, and until six months from that day, after which it would be at the legal rate of five per cent.: *St. John v. Rykert*, 10 S. C. R. 278; *People's Loan Co. v. Grant*, 18 S. C. R. 262. So also interest would be payable if the award had been made at any time within the six months next after the expiration of the term, for the covenant for payment within that time would still be capable of fulfilment, and therefore still in force, and if the award was made on the very last day of the six months, I think the defendants would still be obliged to pay six months' interest from the 1st November, 1900, at seven per cent.

The award, however, not having been made within the time limited for payment, it was impossible for the defendants to pay within that time, and, although they do not dispute their liability to pay the value fixed by the award, they dispute the obligation to pay interest. They say that that obligation was done away with by the extension of time. They say that the effect of the extension was, that although if the award had been made one day before the six months had expired, they would have had to pay interest, if made one day after, they would not, which would be a rather startling result.

In *Birch v. Joy*, 3 H. L. Cas. 565, which was a case of a contract for the sale of an estate, there had been a variation of the original contract by a subsequent agreement, and Lord St. Leonards said, p. 591, that the only true mode of ascertaining the real intention of the contract was to consider it at first without reference to the second agreement.

Doing that in this case, we see that the intention was that inasmuch as when the term expired the title to the buildings would at once vest in the lessors without any conveyance, would merge in the freehold, and the lessors would at once be entitled to possession and to the rents and profits, the lessees should have interest on the purchase money of the buildings from that time, in case the lessors required time, not exceeding six months, to make payment. That agreement accorded with what was fair and just between the parties, and with the doctrine of Courts of Equity in cases of sales such as this. That doctrine was clearly stated by the same Judge in the case already referred to in a passage just preceding that already quoted. He said, speaking with reference to the contract then before the Court: "This contract, if it had been executed by a Court of Equity, would have been executed according to equity and good conscience, and according to the rules of the Court, upon which there cannot be any difference at the bar. From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed the owner of the purchase money, and that purchase money, not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they

exchange characters in a Court of Equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. 'That is the settled rule of a Court of Equity.'

Now the present contract was drawn conformably to this settled rule of equity, inasmuch as the lessors would have a complete title and possession on the 1st November, and if they required time to pay they were also to pay interest, and the lessee was to have a lien on the estate as security until payment was made. By that agreement the award was to be made at or before the end of the term. But finding that the award could not be made before the end of the term, the time was extended by mutual consent. There is not a word in this new agreement changing or varying the original contract in any other respect, and so the provisions of the latter must stand and have effect as far as possible, except so far as necessarily interfered with by reason of the extension. Now it appears to me that the original agreement can and ought to stand in everything except as to the time of payment. That was to be within six months after the expiration of the term. By the consent of parties the award was not made until after that time, and so the payment could not be made until afterwards. The time for payment was in effect postponed by consent. No new day or time was named, and so payment would be due when the award was made and published. But that did not do away with the agreement to pay interest from the 1st November, 1900. That still stands as an essential part of the original agreement and is still binding on the defendants. I suppose no one would argue that payment of interest was dispensed with by a subsequent agreement that the amount of the award might be paid within twelve months instead of six months as provided in the original deed.

It was argued that interest was agreed to be paid as the consideration for time for payment after the amount to be paid was ascertained. That is plausible, but is a mere guess. A better guess would, I think, be that it was agreed to be paid because it would be unjust that the lessors should have the buildings at and from the 1st November, but that the lessees should not have their money until some later day without interest.

In *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93, which was a case of land taken by the company, and of which they had entered into possession, the amount of compensation to be paid to the landowner was referred to arbitration. An award was made, but it was afterwards set aside and sent back to the arbitrators. No binding award, however, was made, and the compensation was ultimately assessed by a

jury in an action at £2,000, five years after possession taken. The landowner claimed interest on that sum from the time the company took possession, and his claim was conceded, Bacon, V.-C., quoting the language of the Lord Chancellor in *Birch v. Joy*, and adding: "If I were to withhold payment of interest, I should not only be going against the cases which have been cited, but I should be going against common sense, justice, and honesty."

In *Piggott v. Great Western R. W. Co.*, 18 Ch. D. 146, Jessel, M.R., held the railway company liable to pay interest not merely from the time when they actually took possession, nor from the date of the award ascertaining the amount of the purchase money, but from the time when the company might prudently have taken possession, resting his judgment upon the ordinary rules as between vendor and purchaser, and referring with approval to *Rhys v. Dare Valley R. W. Co.* And, if I had not come to the conclusion that the agreement for the payment of interest was left in full force by the extension of the time for making the award, I should still have been of opinion that the vendors were entitled to interest at five per cent. from the expiration of the term.

By the original agreement the vendors were only to have interest at seven per cent. for six months, so I think they cannot have it at that rate for any longer period under the agreement as altered by the extension of time. The judgment has allowed interest at seven per cent. for thirteen months, and I think it ought to be varied to that extent. There should be interest at seven per cent. for six months, and after that at five per cent.

GARROW, J.A., gave reasons in writing for coming to the same conclusion.

MOSS, J.A., concurred without giving reasons.

OSLER, J.A., also concurred, but *dubitante*, giving his reasons in writing.

NOVEMBER 24TH, 1902.

C. A.

UNION BANK OF CANADA v. RIDEAU LUMBER CO.

Damages—Measure of—Trespass—Entering on Land and Cutting and Removing Timber—Value of Timber—Other Elements of Damage—Distinction between Trover and Trespass.

Appeal by defendants and cross-appeal by plaintiffs from an order of LOUNT, J., in Court, allowing an appeal from the report of the Master at Ottawa, to whom the question of

the amount of damages sustained by plaintiffs by the trespasses of defendants in entering upon, and cutting and carrying away a large quantity of timber from, certain timber limits, was referred by STREET, J., at the trial, who held the trespasses as alleged by plaintiffs to have been established.

The statement of claim alleged that the trespasses were wrongfully and wilfully committed.

The formal judgment at the trial adjudged that plaintiffs have the right to recover damages from defendants in respect of the matters complained of in the plaintiffs' statement of claim, and referred it to the Master to ascertain the value of the timber cut and the damage to plaintiffs from and incidental to the cutting down and carrying away thereof, and other trespasses committed by defendants upon and in respect of plaintiffs' timber limits, and adjudged that defendants should pay to plaintiffs the amount thereof when so ascertained.

The Master found that the trespasses were not wilful, but rather innocent or inadvertent, and applied the milder rule of assessment.

LOUNT, J., on appeal, directed that the matter should be referred back to the Master to ascertain and report the amount of the damages on the footing of "wrongful and wilful" trespass.

The appeals were heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A.

G. F. Henderson, Ottawa, for defendants.

W. M. Douglas, K.C., and J. F. Smellie, Ottawa, for plaintiffs.

The judgment of the Court was delivered by

GARROW, J.A.—The learned Judge apparently held that the nature and quality of the trespasses in question were *res judicata* by the judgment pronounced at the trial—a conclusion which, with deference, I am inclined to doubt—but as, after a careful perusal of the evidence, I am of the opinion that the formal judgment defining the trespasses as "wrongful and wilful" is correct, and should be sustained, it would be a waste of time to attempt to solve this doubt, nor is it necessary, in the view which I take, to deal specifically with the several heads of appeal nor with the cross-appeal by plaintiffs. The whole matter should, I think, be referred back to the Master for reconsideration upon the new footing of wrongful and wilful trespass. . . .

The action, it is to be observed, is purely one of trespass, and the formal judgment at the trial so treats it.

In *Smith v. Baechler*, 16 O. R. 293, *Wooden Ware Co. v. United States*, 106 U. S. R. 432, and *Tuttle v. White*, 46 Mich. 485, the articles had reached the hands of purchasers from the original trespassers, who, of course, had no better title than their vendors had. Demands were made in each case upon the defendants for the return of the articles themselves and not acceded to. Such demands and refusals were held to constitute a wrongful conversion of the articles by the defendants.

In trover the value of the article at the time of conversion is the proper measure of damages: *Scott v. McAlpine*, 6 C. P. 304; *Henderson v. Williams*, [1895] 1 Q. B. 527. . . .

Such a rule has not, I think, been applied in cases such as this, where the original trespasser is sued, not because he is entitled to any consideration, but because in trespass the value of the article taken is not the only or necessarily the chief element which enters into the question of the amount of damages recoverable. And yet, after all, the real inquiry is not seriously different. In trover it is, subject of course to allegation and proof of special damage, the value of the article converted at the time of conversion (of which conversion the demand and refusal are merely evidence), whereas in trespass the inquiry is, what damages will compensate the plaintiff, or restore him financially to his original position as nearly as possible at the time when the trespass was committed.

Here the trespasses were committed, and as continuing acts completed, when the defendants had cut and removed the timber off the plaintiffs' lands or timber limits. The plaintiffs might have followed the articles and claimed them, as I have pointed out, and, had they done so, would, I think, have established, in case of a refusal to deliver, a different cause of action. But, instead, they have sued in trespass, and the damages recoverable in actions of trespass must now, I think, be the measure of their recovery.

The exact point has not, so far as I can find, received much, if any, consideration in this Province, probably because such questions as the amount of damages are usually determined as questions of fact by juries under judicial charges more or less general in their terms.

[*Flint v. Bird*, 11 U. C. R. 444, referred to.]

The question, however, has been repeatedly discussed in England, especially in underground trespasses in the getting of coal, and, as there is apparently no difference between a trespass underground and one on the surface (*Hunter v. Gibbons*, 1 H. & N. at p. 465, and *Bulli Coal Co. v. Osborne*,

[1899] A. C. at p. 361), there is no reason, I think, why the principles of these coal cases should not apply.

[*Martin v. Porter*, 5 M. & W. 351, *Bulli Coal Co. v. Osborne*, supra, *Trotter v. McLean*, 13 Ch. D. 574, *Jegon v. Vivian*, L. R. 6 Ch. 762, *Taylor v. Mostyn*, 33 Ch. D. 226, *Llignvi v. Brogden*, L. R. 11 Eq. 188, *Attorney-General v. Tomline*, 5 Ch. D. 750, 15 Ch. D. 150, and *Morgan v. Powell*, 3 Q. B. 278, referred to.]

Applying the rules laid down in these cases to the present case, it appears to me that the proper measure of damages is:

1st. The value of the timber after it was severed and manufactured, as far as it was manufactured while on the timber limits of plaintiffs, immediately before defendants removed it. Such value may be conveniently ascertained by taking into account the amount for which defendants afterwards sold the articles, less the cost of carriage and excluding the cost of severing and manufacturing.

2nd. Such sum (if any) as represents the extent to which the timber limits themselves may have been injured for the purpose of working or of selling them by reason of their having become partly denuded by the acts of defendants, because it may well be that, over and above the value of the timber taken, a serious injury may have been done to the value of the timber left; and in order that plaintiffs may be fully compensated this should be taken into account.

3rd. Such further and other damage as plaintiffs may show, or have shown in case no further evidence is offered, resulted to the timber limits by the acts of defendants, such, for instance and by way only of illustration, as wasteful methods in cutting, manufacturing, and otherwise using or destroying not merely the trees taken, but those left, if those left were cut down or injured; also damages, if any, for using the surface to pass and repass, and for cutting and making roads, etc.; all of which were, of course, wrongful and included in the trespasses complained of, and not necessarily included in the value of the articles themselves, the chief element in determining the plaintiffs' compensation.

With these instructions, I think the matter should be remitted to the Master, the defendants' appeal dismissed with costs, and the cross-appeal of plaintiffs also dismissed, but without costs.

NOVEMBER 24TH, 1902.

C. A.

McDERMOTT v. HICKLING.

Mistake—Recovery of Money Paid under Mistake of Fact—Mortgage Account—Acknowledgment—Laches—Estoppel—Statute of Limitations—Costs—Appeal—Leave to Present Cross-appeal after Hearing of Main Appeal.

Appeal by defendants G. W. L. Hickling and C. M. Hickling, as executors, from the judgment of ROBERTSON, J. (*ante* 19) in favour of plaintiff in an action to recover moneys alleged to have been, by mistake, overpaid upon a mortgage, and cross-appeal by plaintiff against defendant G. W. L. Hickling personally. The mortgage was made in 1885, for \$2,750. The mortgagors (represented by plaintiff) made payments from time to time to the mortgagee, and after his death, in 1892, to his executors. Written receipts were given to the mortgagors, and an account was kept by the mortgagee in a book, but, as found by the trial Judge, the mortgagee failed to credit a payment of \$153 made on the 1st November, 1890, and a further payment of \$25.16 made on the 27th February, 1892. In November, 1894, the three executors assigned the mortgage to the defendant G. W. L. Hickling (himself one of the executors) in part payment of a legacy to him from the mortgagee. The amount mentioned in the assignment as due upon the mortgage was \$1,159 and interest, but this was made up from the book, and in arriving at it credit was not given for the two payments of \$153 and \$25.16. On the 2nd March, 1895, the plaintiff signed a written acknowledgment that the amount due at that date was \$1,159.54 for principal and \$76.49 for interest. Further payments were made from time to time by the mortgagors, and on the 23rd February, 1901, they made a final payment of \$474.88 to the defendant G. W. L. Hickling, the assignee of the mortgage, which was supposed by them and by him to be the balance due, though the true amount was about \$168 only. This action as launched was against the defendant G. W. L. Hickling only, as assignee of the mortgage, but the plaintiffs before the trial added the other executor, C. M. Hickling, as a defendant, and claimed an account against the estate.

The trial Judge found that the mortgagors were uneducated and incapable of keeping accounts or understanding them when made out, and depended entirely on the mortgagee, and, after his death, upon the active executor, for the

keeping of the account, and, although they had the written receipts in their possession, they never had the account checked by them or an independent account made up from them; and he held that the money paid in excess of the amount due, having been paid in ignorance of the facts, was recoverable, notwithstanding the acknowledgment and notwithstanding laches, the mortgagors not having waived all inquiry; also, that there was no estoppel; and that the plaintiff's claim was not barred by the Statute of Limitations; and he gave judgment against the executors.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, J.J.A.

W. M. Douglas, K.C., and W. A. Boys, Barrie, for the executors, contended that they were not liable for the overpayment (if any) to the assignee of the mortgage, and that at all events there was an estoppel, and the Limitations Act applied.

H. H. Strathy, K.C., and C. W. Plaxton, Barrie, for plaintiff, contended that he was entitled to recover against the executors, but, if not, then against the assignee personally.

OSLER, J.A.—The judgment of Robertson, J., against the executors is manifestly wrong, because their testator was not the person who received the erroneous overpayments now sought to be recovered back. He omitted, no doubt, to give credit in his books or on the plaintiff's mortgage for two items now proved by his receipts therefor to have been paid to him, but plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors of the mortgagee subsequently assigned the mortgage to the defendant G. W. L. Hickling, in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time, therefore, when these payments should have been taken into account was when the mortgage was being paid off to the defendant G. W. L. Hickling. I am unable to perceive anything in the evidence which created any estoppel as between him and plaintiff so as to have prevented the latter from then claiming credit for these payments. G. W. L. Hickling was one of the executors. He himself admits that he did not take over the mortgage in reliance upon any statement or admission then made by plaintiff of the amount due, and there is nothing which can stand in the way of his obtaining indemnity from the estate of the testator, which has not yet been fully wound up or administered, for any sum the mortgage may be found to fall short of what he took it for. He,

and not the testator, was the person who received too much, and it is the payment to him which was erroneous, and by the amount of the sums received but not credited by the testator, made under a mistake of fact, since there was not then, by that amount, so much due on the mortgage held by him. The cause of action is, strictly, to recover back money paid, by a mistake of fact, to him and not to the executors.

I cannot understand why the executors were made parties to the action, or why G. W. L. Hickling being also a party in his individual capacity, judgment was not given against him, instead of against them.

The executors have appealed, insisting that this action ought to be dismissed as against them, and I think they are right. The plaintiff, unfortunately, omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. Hickling, and we have, since the argument of the executors' appeal, on which the rights of all the parties were discussed, permitted him to do so. We thought it possible that G. W. L. Hickling might desire to have the relief over against the executors which he seems clearly entitled to, but are now informed that no order of that kind is sought for. No doubt, he and his co-executor will settle the matter between themselves, and we have only to give the judgment which, in our opinion, our brother Robertson should have given at the trial, namely, judgment for the plaintiff against G. W. L. Hickling for the amount to which he has been held entitled, and the costs of the action down to the trial and settlement of the judgment before Robertson, J., as if G. W. L. Hickling had been the original and only defendant. As against the executors, the action must be dismissed with costs. There should be no costs of the appeal to any of the parties. Not to the plaintiff, because the appeal has been rendered necessary by his erroneous proceedings, and he fails as against the executors. Nor to G. W. L. Hickling, because in the result the plaintiff has succeeded against him. And not to the executors, because the whole of the litigation might have been avoided if they had acted reasonably and justly on discovering the error made by the testator, and had arranged between themselves and the plaintiff to indemnify G. W. L. Hickling at once by making good to the former the amount which G. W. L. Hickling is now ordered to pay him.

GARROW, J.A., gave written reasons for coming to the same conclusion.

MACLENNAN and MOSS, JJ.A., also concurred.

STREET, J.

NOVEMBER 25TH, 1902.

CHAMBERS.

RE EXCELSIOR LIFE INSURANCE CO. AND DEGEER.

Life Insurance—Policy in Favour of Mother—Advance by Mother on Faith of—Subsequent Marriage of Insured—Apportionment in Favour of Wife—Claim by Mother as Beneficiary for Value.

Appeal by Sarah Ann DeGeer from order of Master in Chambers (ante 702) declaring that Melina Amelia DeGeer, the widow of James DeGeer, was entitled to \$174.25 payable under a policy of life insurance in the company, and directing payment out of Court.

A. E. H. Creswicke, Barrie, for the appellant.

R. McKay, for the company and the widow.

STREET, J.—I think the case is governed by Potts v. Potts, 31 O. R. 452. The amendment effected by 1 Edw. VII. ch. 21, sec. 2, is merely a confirmation of the law as declared in that case.

Appeal dismissed with costs.

STREET, J.

NOVEMBER 25TH, 1902.

TRIAL.

LENNOX v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury.

Action tried at Barrie, brought under Lord Campbell's Act, for damages for the death of a man who was run over by a train on defendants' line where it crosses the sixth concession of the township of Flos. The jury found defendants negligent in not whistling, and assessed the damages at \$2,500, but answered in the affirmative a question as to whether deceased could have avoided the accident by the exercise of reasonable care.

STREET, J., held that Brown v. London Street R. W. Co., 2 O. L. R. 53, supported defendants' claim to judgment on the answer to the last question, which was answered by the jury in the only way they could upon the evidence have properly answered it.

Action dismissed with costs.

STREET, J.

NOVEMBER 26TH, 1902.

CHAMBERS.

RE PINK.

*Will—Construction—Conflicting Bequests of Personality—Reconciling
—Ejusdem Generis Rule—Residuary Bequest.*

Motion by Henry Brown and Margaret Rosevear, executors of the will of Alexander Pink, deceased, for a summary order declaring the construction of certain clauses of the will, which was dated 28th November, 1899. The testator died on 9th April, 1902. He appointed the applicants executors, and directed them to pay his debts. Then he made the following provisions: "I give and bequeath all my clothing, wearing apparel, and personal effects to my brother Robert Pink. I give and bequeath all my household furniture and other personal property to my sister Margaret Rosevear." He then devised to his sister Margaret Rosevear for her life all his real estate, with remainder in fee to his nephew Roy Pink, subject to certain legacies and annuities which he charged upon it. He then wound up his will with the following provision: "The rest and residue of my real and personal property I give, devise, and bequeath to my nephew Roy Pink." At the time of his death the personal property of the testator consisted of: household goods and furniture, \$150; farming implements, horses, cattle, etc., about \$500; book debts, \$35; cash on hand and in bank, \$273; wearing apparel, watch and chain, etc., \$25; total, \$983. The questions to be determined were as to the effect of the three bequests of personality set out above.

W. F. Kerr, Cobourg, for the executors and for Margaret Rosevear personally.

B. Morton Jones, for Robert Pink.

F. W. Harcourt, for Roy Pink, an infant.

STREET, J.—The testator intended to give part of his personal estate to his brother Robert, and part to his sister Margaret. Whether he also intended to give any part to his nephew Roy was the principal difficulty. It being necessary to limit the gift to Robert in order to leave something for Margaret, a strict construction must be placed upon the gift to Robert, and this is readily done by applying the principle of *ejusdem generis* to it. All that Robert took was the clothing and wearing apparel and the watch and chain, because the testator limited the bequest to his strictly personal effects, that is to say, to the effects connected with his person, such as his clothing and wearing apparel. But it would not be

proper to place a similar limited construction upon the gift to Margaret. There is no necessity for holding that the testator intended Roy to take part of his personal estate under all circumstances; the gift, being of a residue only, would be satisfied by the possibility of his taking under the residuary clause any gift that should lapse. This view is confirmed by the testator's devise of all his real estate, followed by a bequest and devise of the residue of his real and personal property. The testator, having disposed of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. Therefore, all the personal estate which does not pass to Robert passes to Margaret, and none to Roy.

Order accordingly. Costs of all parties of the application to be paid out of the personal estate going to Margaret.

STREET, J.

NOVEMBER 26TH, 1902.

CHAMBERS.

RE DAUBENY.

Will—Construction—"Personal Representatives"—Executors or Next of Kin—Part Intestacy—Rights of Widow—Advertisement for Creditors.

Petition for payment of money out of Court. The direction in the will to the executors of Barak Daubeny was to divide the estate upon the death of his widow amongst the persons named. William Gough, one of these persons, survived the testator, but died in the widow's lifetime, leaving a widow, now Alice Otter, but no children, and leaving the petitioners, his sister Jane Allingham and his half-brother Flinton John Medforth, his only next of kin. It was plain by the terms of the will that the share did not vest in William Gough during the lifetime of the testator's widow, but passed under the substituted gift to his personal representatives upon the happening of his death in the lifetime of the testator's widow. The question was, whether by the term "personal representatives" the testator intended that William Gough's executors or administrators should take, or his next of kin.

W. H. Blake, K.C., for the petitioners.

D. L. McCarthy, for the executor of William Gough.

STREET, J.—When there is a gift of the income to one for life, followed by a gift of the corpus at the termination of the life estate to another, with a substitutional gift to the

"personal representatives" of that other, then, in the absence of a clearly controlling context, these words are to be construed as meaning "executors or administrators," and not "next of kin." Re Crawford's Trusts, 2 Drew. 230, Hinchcliffe v. Westwood, 2 DeG. & Sm. 216, and Re Thompson, 55 L. T. 86, referred to. And therefore the share of William Gough became vested in his executors as part of his estate to be administered.

William Gough by his will bequeathed to his widow certain specific articles. Such bequest can not be stretched to cover his share of the Daubeney estate, and, there being no residuary bequest, there was an intestacy as to that share, now represented by the moneys in Court.

William Gough having died before 1st July, 1895, and not wholly intestate, his widow is not entitled to the increased rights given by sec. 12 of R. S. O. ch. 127, but merely to her share under the Statute of Distributions.

There should be an advertisement for creditors and persons having claims on the estate of William Gough, in the Gazette and a Sarnia newspaper, unless it can be shewn that an advertisement has already appeared. Subject to any claims that may be filed, the moneys in Court, after payment of the costs of all parties of this application, should be paid out one-half to Alice Otter and the other half to the next of kin of William Gough.

WINCHESTER, MASTER.

NOVEMBER 27TH, 1902.

CHAMBERS.

HOLNESS v. RUSSELL.

Lunatic—Plaintiff Becoming Insane after Judgment — Proposed Appeal—Appointment of Next Friend—Inspector of Prisons and Public Charities.

Motion made on behalf of plaintiff, who had become insane since the trial of this action, for an order appointing her husband her next friend to enable an appeal to be taken to a Divisional Court.

E. Coatsworth, for plaintiff.

J. H. Denton, for defendant, objected that the Inspector of Prisons and Public Charities was the proper person to be appointed next friend.

THE MASTER held, following Mastin v. Mastin, 15 P. R. 177, that this objection could not be sustained. Order made as asked. Costs in the cause.

NOVEMBER 27TH, 1902.

DIVISIONAL COURT.

FLETT v. COULTER.

Infant—Party to Action—Right of Opposite Party to Examine for Discovery—Discretion of Examiner.

Appeal by plaintiff, an infant of the age of 12 years, by his next friend, from an order of MEREDITH, C.J., in Chambers, dismissing an appeal by plaintiff from an order of the Master in Chambers directing plaintiff to attend at his own expense before a special examiner and submit to be examined as to his competency to give evidence, and to submit to be examined viva voce for discovery, unless the special examiner should deem him of too tender an age to be examined viva voce upon oath. An affidavit of plaintiff's mother was filed upon the motion, but it shewed no mental incapacity on the part of plaintiff.

J. G. O'Donoghue, for plaintiff.

W. R. P. Parker, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—We should adhere to the practice settled nearly eleven years ago in *Arnold v. Playter*, 14 P. R. 399, and dismiss the appeal.

It appears to us that the provision of the order which gave to the examiner a discretion to determine the competency of the infant and to act accordingly, was not in accordance with proper and convenient practice. The proper manner of raising any question as to the competency or capacity of the party to be examined is by a motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be raised and considered by the Court itself. If it be left to the examiner, the Court is not always in a position to review his discretion upon the same evidence as that upon which he exercised it.

Appeal dismissed with costs.

Moss, C.J.O.

NOVEMBER 27TH, 1902.

C.A.—CHAMBERS.

HINDS v. TOWN OF BARRIE.

Appeal—Leave—Question of Substance—Joinder of Plaintiffs and Causes of Action.

Motion by defendants for leave to appeal from order of a Divisional Court dismissing appeal from order of MEREDITH,

C.J., in Chambers, dismissing application by defendants for an order calling upon plaintiff to elect which of the two defendants, the town corporation and Reuben Webb, she will proceed against. The action was brought for negligence, the defendants, as they alleged, being charged with separate acts, done at different times, the result of both of which was to cause the damage.

W. M. Douglas, K.C., for defendants.

A. E. H. Creswicke, Barrie, for plaintiff.

MOSS, C.J.O.—The question is one of substance, and not of mere practice, and sufficient has been shewn to make it proper that it should be further discussed before the parties proceed to trial.

Leave granted on the usual terms.

WINCHESTER, MASTER.

NOVEMBER 28TH, 1902.

CHAMBERS.

DUTHIE v. McDEARMOTT.

Partnership—Appearance as for—Foreign Corporation Carrying on Business without License.

Motion by defendants to set aside appearance on the ground that it was entered without authority. The defendants, under the name of "McDearmott, Evans, & Lee," were doing a brokerage and stock business in Toronto. The person representing them in Toronto employed solicitors on their behalf to arrange certain matters for them, and instructed such solicitors to accept service of the writ of summons in this action, which they did, and believing defendants to be a firm, entered an appearance for each supposed member of the firm. It turned out, however, that defendants were not a firm, but a foreign corporation, having become incorporated in the State of New York.

W. H. Blake, K.C., for defendants.

G. Grant, for plaintiff, referred to *Bank of Montreal v. Bethune*, 4 O. S. 341, and *Genesee Mutual Ins. Co. v. Westnall*, 8 U. C. R. 487.

THE MASTER.—Neither of these cases nor the statute 63 Vict. ch. 24 (O.) shews that a foreign corporation carrying on business in Ontario, without a license, can be treated as a partnership or firm. The appearance was improperly entered. But, although the solicitors had no authority to act for the corporation, they entered the appearance in good faith.

Order made striking out appearance without costs.

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WINCHESTER, MASTER.

NOVEMBER 28TH, 1902.

CHAMBERS.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE
CORPORATION.

*Life Insurance—Action on Policy—Condition as to Arbitration—
Public Policy—Application to Stay Proceedings.*

Motion by defendants for an order staying all proceedings in an action brought by the beneficiary (mother) named in a policy of insurance issued by defendants on the life of the late Dennis Nolan for \$1,000, to recover that sum. The motion was made on the ground that plaintiff was not entitled to maintain the action, inasmuch as there had been no award under condition No. 15 incorporated in the contract upon which the action was brought, and that the provisions of condition 15 had not been complied with. The application was made under R. S. O. ch. 62, sec. 6.

H. Cassels, K.C., for defendants, cited *Guerin v. Manchester Fire Assurance Co.*, 29 S. C. R. 139, and *McInnes v. Western Assurance Co.*, 5 P. R. 242, 30 U. C. R. 580.

S. Alfred Jones, for plaintiff, contended that there was no submission signed by both parties, as required by R. S. O. ch. 62, secs. 2, 6; that the condition ousts the jurisdiction of the Court, and is, therefore, void as contrary to public policy, citing *Caledonian R. W. Co. v. Weenock and W. B. R. W. Co.*, 2 H. L. Sc. 347; *Davies v. Fitzgerald*, 1 Ex. D. 237; *Collins v. Locke*, 4 App. Cas. 674.

THE MASTER held, following *Scott v. Avery*, 5 H. L. Cas. 811, *Edwards v. Aberayson Mutual Sun Ins. Society*, 1 Q. B. D. 563, *Reed v. Washington F. and M. Ins. Co.*, 138 Mass. 572, and cases there cited, that plaintiff was entitled to proceed notwithstanding condition 15.

Motion refused. Costs to plaintiff in the cause.

BRITTON, J.

NOVEMBER 29TH, 1902.

WEEKLY COURT.

LACHANCE v. LACHANCE.

Dower—Reference—Report—Reference back — Judgment—Costs—Sale of Land.

Motion by plaintiff for judgment on report of local Master at Windsor in action for dower, and cross-motion by defendant for a reference back to the Master to take further evidence.

F. C. Cooke, for plaintiff.

R. U. McPherson, for defendant.

BRITTON, J., held, that, considering the small amount involved and the very large expense already incurred, no useful purpose would be served by a reference back to the Master. Defendant's motion dismissed without costs, and judgment for plaintiff for amount found due by the report, increased by the costs of the action, of the reference, and of this motion; the costs of this motion to be taxed as if it had been unopposed; and for sale of the lands on default for one month in payment of amount so ascertained.

FALCONBRIDGE, C.J.

DECEMBER 1ST, 1902.

WEEKLY COURT.

RE CO-OPERATIVE CYCLE AND MOTOR CO.

Company—Winding-up — Contributories — Subscription for Shares—Extrinsic Evidence—Placing Shares—Commission—Payment for Shares—Contract—Consideration—Transfer of Assets.

Appeal by liquidator from report of Neil McLean, official referee, in the matter of the winding-up of the company, refusing to place McPherson, Nott, and Coulter on the list of contributories.

E. B. Ryckman and A. T. Kirkpatrick, for the liquidator.

C. H. Ritchie, K.C., for McPherson.

G. H. Watson, K.C., for Nott.

J. D. Falconbridge, for Coulter.

FALCONBRIDGE, C.J.: — In McPherson's case I accept the findings of the referee, which are based on almost

uncontradicted testimony. The extrinsic evidence is not within the mischief of the general rule as tending to vary the written contract. The use of the word "commission" in the letter of 30th March, 1901, shews that the transaction is not an ordinary subscription for shares, and the real transaction could be explained by parol evidence. See per Lord Davey in *Bank of New Zealand v. Simpson*, [1900] A. C. at p. 188. The case is not one of the illegal issue below par of shares in the capital stock of a company, as in *North-West Electric Co. v. Walsh*, 29 S. C. R. 33, but it is an agreement to place shares, which is not equivalent to "take shares." *Re Monarch Ins. Co., Gorrieson's Case*, L. R. 8 Ch. 507. The payment by a limited company of a reasonable amount to brokers by way of commission or brokerage for placing shares is not an act ultra vires of the company: *Metropolitan Coal Commissioners Assn. v. Scrimgeour*, [1895] 2 Q. B. 604. What is a reasonable amount depends on the circumstances, and the amount stipulated for here was, the president of the company swears, not unreasonable. This appeal is dismissed with costs.

In Nott's case and Coulter's case, the findings of the referee are in entire accordance with the evidence. Section 25 of the English Companies Act, 1867, made especial provision for the filing of a contract respecting payment of shares in anything but cash, and the English Companies Act, 1900, sec. 331, while repealing sec. 25, makes provision for filing certain returns as to allotments of shares issued for a consideration other than cash. But there seems to be no corresponding section in the Ontario Companies Act. The transaction which the liquidator seeks to impeach was one connected, complete, and integral transaction before the incorporation of the company. There was bona fide consideration for having the shares paid up, and the question of value is not capable of being raised here. And there is no doubt about the identity of the smaller number of shares as being part of the greater. One or more of these elements will be found sufficient to distinguish the present case from cases like *Dent's Case*, L. R. 8 Ch. 768; *Fothergill's Case*, ib. 270; *Migotti's Case*, L. R. 4 Eq. 238. Nott's and Coulter's contracts were fully performed by the transfer of assets. The transactions seem to be perfectly straight. Possible creditors cannot be prejudiced, and it would be an extreme hardship if these persons should now be held liable as contributors. Appeals dismissed with costs.

DECEMBER 1ST, 1902.

C. A.

REX v. MOYER.

Criminal Law—Obstruction of Highway—Conviction for—Weight of Evidence—New Trial—Direction to Jury—Proof of Original Survey—Onus.

Appeal by defendant, pursuant to leave, from his conviction by the Court of General Sessions for the County of Lincoln upon an indictment for that on or before the 1st day of June, 1901, in the township of Clinton, he did erect and build or cause to be erected upon the highway, a fence which encroached upon the highway. The case was tried with a jury.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for defendant, contended that the chairman's charge to the jury had the effect of wrongly influencing them, because he said that if defendant was found guilty he could not be severely punished; that evidence was improperly admitted; that the documentary evidence shewed that no road had ever been laid out by survey, and the proper inference to be drawn was that the land occupied by defendant and his predecessors in title from time immemorial had been fenced with reference to a roadway established by use and not survey.

W. M. German, K.C., for private prosecutor.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) on the 24th November gave judgment directing a new trial.

On the 1st December the following reasons were given by

OSLER, J.A.:—The verdict appears to me . . . to be against the weight of the evidence. Leave to appeal was granted by the learned Chairman of the General Sessions on this ground, and he would, I think, have been warranted in reserving a case for our consideration under sec. 743 of the Code, on which we might have been able finally to dispose of this particular indictment.

In more than one respect the case was submitted to the jury on rather narrow grounds. In cases of this kind, where an attempt is being made to straighten or widen an old and long established road by proof of an original survey, upwards of one hundred years old, by which the allowance is supposed to have been established, but in exact conformity with which the road has never been opened, laid out, or travelled, a jury should, as I have more than once had occasion to say,

be distinctly advised that the onus of proof of the survey and of the exact location of the road rests entirely on the Crown or the private prosecutor, and long and undisturbed possession ought not easily to be interfered with, except upon very clear proof of an encroachment upon the public highway. If a reasonable doubt exists, it is much better that the public, represented by the municipal authority, should, if it is desirable to widen or straighten the road, expropriate from the adjoining owners so much land as may be necessary for the purpose, than put the owners and the public to the expense of a harassing and generally costly litigation to enforce what is too often, in the absence of the original measurements, a modern surveyor's theory or assumption of where, or on which side of a line, the road ought to be.

In the case before us, we see that so long ago as the year 1832 the exact location of the line was in doubt, and that the action of the commissioners, though it was not their province to lay it out or establish it, was not in conformity with what is now contended for. The case should have been left to the jury much more favourably to the defendant than it was, instead of practically directing a verdict against him.

DECEMBER 2ND, 1902.

DIVISIONAL COURT.

DAWDY v. HAMILTON, GRIMSBY, AND BEAMS-
VILLE ELECTRIC R. W. CO.

Street Railway—Accident to Passenger—Conductor Attempting to Pull Passenger on Moving Car—Scope of Authority of Conductor—Question for Jury—New Trial.

Appeal by plaintiff from judgment of STREET, J., ante 364, dismissing the action, which was brought for damages for injuries sustained by plaintiff by being dragged along behind one of defendants' cars.

The appeal was heard by BOYD, C., and MEREDITH, J.

W. M. German, K.C., for plaintiff.

E. E. A. DuVernet, for defendants.

The judgment of the Court was delivered by

BOYD, C.:—It does not seem to me that the case has been fully tried by the jury. The question as to the scope of the conductor's authority is one of evidence, upon which the jury should pass if there is any evidence upon the matter. I think there is, and that the effect of it was for them to consider.

. . . It is proved that plaintiff came to the platform station and signalled the car with the intention of taking passage thereon. There was a response made to this signal by the slowing down of the car as it neared the platform. The plaintiff made up her mind that the speed was yet too great for her to attempt to board the car, but it may be fairly inferred that the conductor thought otherwise, so that he made an effort to help plaintiff by seizing her hand as the car was going past; at the same time he rang the bell, which appears to have accelerated the speed of the car, and the plaintiff was thus dragged along and hurt. . . . It is the duty of the conductor to assist people in getting on and off the car, and it may be within the line of his duty to assist those who are apparently about to get on a car while it is slowing up. It would be for the jury to pass upon the circumstances of this case as to the scope of the conductor's authority. . . . Unless the defendants are content with the present findings, and are willing to pay the damages, the action should go for a new trial; costs to abide the result.

DECEMBER 2ND, 1902.

DIVISIONAL COURT.

HULL v. ALLEN.

Trusts and Trustees—Parol Evidence to Establish Trust—Insufficiency of—Costs.

Appeal by plaintiff from judgment of FERGUSON, J., ante 151, in so far as it was against plaintiff.

The action was brought to have it declared that defendant was a trustee for plaintiff in respect of the proceeds of the sale of a timber limit and a brickyard (alleged by plaintiff to have been transferred by him to defendant as trustee for certain purposes), and of a lot containing 141 acres (alleged to have been bought by defendant for plaintiff), and in respect of other matters.

The trial Judge found in favour of plaintiff as to the timber limit and brickyard, and this appeal was taken by him as to the 141 acres, on the ground that the evidence on this point clearly established the trusteeship.

The appeal was heard by BOYD, C., and MEREDITH, J.

Wallace Nesbitt, K.C., for plaintiff.

J. P. Mabce, K.C., for defendant.

BOYD, C.:—The trial Judge was of opinion that the parol evidence was insufficient to establish a case of trust in the acquisition of the land held by the defendant, so as to give relief to plaintiff notwithstanding the Statute of Frauds. Doubtless the law set forth in *James v. Smith*, [1891] 1 Ch. 388, is modified and perhaps changed entirely by *Rochefoucauld v. Bertram*, [1897] 1 Ch. 207; but it is essential that the evidence of such alleged trust be clear and complete to the satisfaction of the Court. That element is here lacking, and the judgment should be affirmed. It is not a case for costs of appeal.

MEREDITH, J., gave reasons in writing for coming to the same conclusion.

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Præcipe Order for—Application for Increased Amount—Election—Costs.

Appeal by plaintiffs from order of MACMAHON, J., ante 724, reversing order of local Master at Ottawa refusing defendants' application for increased security for costs, and requiring plaintiffs to give additional security by bond in \$600 or by payment into Court of \$300.

J. H. Moss, for plaintiffs.

D. L. McCarthy, for defendants.

THE COURT (BOYD, C., MEREDITH, J.) held that the Master was not bound by the decisions to limit the defendants to the amount of security provided for by the præcipe order obtained by them, and the Judge having on appeal exercised a discretion, it would not now be interfered with. In the cases relied on by the Master, *Bell v. Landon*, 9 P. R. 100, had been strained beyond its fair application.

Appeal dismissed, but order of MACMAHON, J., varied by directing that the costs of the motion before the Master and of the first appeal should be costs in the cause. Costs of this appeal also to be costs in the cause.

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

BAIN v. COPP.

*Insurance—Life—Policy on Life of One Person for Benefit of Another
—Assignment—Death of Assured—Claim by Administrator.*

Appeal by plaintiff from judgment of MACMAHON, J., ante 707, in favour of defendants in an interpleader issue.

S. W. McKeown and J. W. McCullough, for plaintiff.

W. N. Tilley, for defendants.

THE COURT (BOYD, C., MEREDITH, J.) dismissed the appeal without costs.

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

MCDONALD v. SULLIVAN.

*Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Land-
lord—Executors—Devolution of Estates Act.*

Appeal by judgment creditor from order of STREET, J., ante 723, sub nom. Reilly v. McDonald, allowing appeal from order of Master in Chambers, ante 721, and discharging a garnishing summons, under the circumstances mentioned ante 721.

The appeal was heard by BOYD, C., and MEREDITH, J.

W. Proudfoot, K.C., for judgment creditor.

L. V. McBrady, K.C. for judgment debtors.

BOYD, C.— . . . What was decided in McAuley v. Rumball, 19 C. P. 286 (of which the head-note is so insufficient as to be misleading) was that a debt due to one in a representative character cannot be garnished to answer a debt owing by him in a private capacity, but a debt due to a dead judgment debtor may be attached as against his personal representative: Stevens v. Phillips, L. R. 10 Ch. 416; Nash v. Pearce, 47 L. J. Q. B. 766. Here the debt was due by several judgment debtors, and the rent garnished was payable to them as owners of the land under rent. The south half of the land was owned by G. W. Reilly, the father of the judgment debtors, and it had descended to them on his death intestate. The other half was owned by George Reilly, his son, who died pending the action, liable for the costs which form the debt

in question, and his liability was taken up in the action by his executrix, Mary Sullivan. As to her liability the case is plain, and as to the others, the intervention of the administratrix, who assumed to lease part of the land, is not material, for no caution was registered, and no estate is in her, and while she might collect the rent, it is only for the beneficial use of the heirs. There are no creditors of either estate affected by the garnishment, and I think it should work its full effect. Order appealed from reversed and order of Master in Chambers restored. Costs of all the proceedings to judgment creditor out of rent attached.

MEREDITH, J., gave reasons in writing to the same effect.

DECEMBER 5TH, 1902.

C. A.

GRAND HOTEL CO. OF CALEDONIA SPRINGS v.
WILSON.

GRAND HOTEL CO. OF CALEDONIA SPRINGS v.
TUNE.

Trade Name—Infringement of—"Caledonia Water"—Geographical Designation.

Appeal by defendants from judgment of BOYD, C., 2 O. L. R. 322, in favour of plaintiffs in an action to restrain the defendants from infringing the plaintiffs' trade names and for damages.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, J.J.A.

W. E. Middleton, for appellants.

F. Arnoldi, K.C., for plaintiffs.

MACLENNAN, J.A.—The injunction granted by the Chancellor restrained the defendants (1) from advertising or selling their water in the Province of Ontario under the name of "Caledonia Water;" (2) or as coming from the springs owned or leased by plaintiffs; (3) or enclosed in any bottles, barrels, or packages having any mark or label contrived to represent their water as coming from the plaintiffs' springs; (4) and particularly from using or applying in Ontario to the defendants' water the words "Caledonia Water," "Water from Caledonia Springs," or "Water from the New Springs at Caledonia;" and (5) from so using and applying in the Province of Ontario any name or title of which the word

"Caledonia" forms a part, in a way calculated to deceive the public into the belief that the water sold by defendants is mineral water from plaintiffs' springs. He also directed a reference as to damages. The first member of the mandatory part of the judgment should stand against the defendants Tune & Son, but not against any of the other defendants. There was no evidence that they, or any of them, sold or desired or intended to sell their water as, or under the name of, "Caledonia Water," or that any of the defendants, Tune & Son included, intended or desired to lead their customers to suppose that they were getting water which came from the plaintiffs' springs. For the same reasons, the 2nd, 3rd, and 4th members of the mandatory part of the decree were objectionable and should be struck out. There was no evidence that any of the defendants, except Tune & Son, as already mentioned, advertised or sold their water as coming from the springs owned or leased by plaintiffs, or enclosed in any bottles, barrels, or packages having any mark or label contrived to represent their water as coming from the plaintiffs' springs, or used or applied in Ontario to the defendants' water the words "Caledonia Water" or "Water from Caledonia Springs." They have used the phrase "Water from the new Springs at Caledonia" as descriptive of their water, and they justify their doing so. The Chancellor thought that it was not correct for defendants to speak of the water sold by them as from "new springs," because it was reached by means of boring and drilling, and rises from an artesian well, while the plaintiffs' water issues naturally from the earth, and is and has long been the spontaneous outflow of mineral springs. But the defendants' wells are flowing wells. The water springs up spontaneously from the earth through the orifices drilled or bored by defendants. The word "springs" is the natural and appropriate word to use to designate the flowing well of defendants, and they do no more than exercise their legal right in designating them as springs. The Chancellor also found fault with the use by defendants of the word "Caledonia." The defendants have an undoubted right to describe their water correctly and truthfully. It is a saline mineral water. It is derived from new springs, and these springs are in the township of Caledonia, and at a place called Caledonia Springs. If defendants' water is likely to be more sought after and more marketable, and if the business of selling it is likely to be more profitable, by reason of the situation of the springs, and their nearness to the famous old springs, the defendants are entitled to the benefit of that. The Chancellor also thought there was inaccuracy in saying

"New Springs at Caledonia," instead of "in Caledonia." The defendants might have said with perfect correctness "New Springs at Caledonia Springs," for the phrase "Caledonia Springs" means not only the springs of water; but the place or neighbourhood where they are situate. The defendants' description of their water as water from "The New Springs at Caledonia" is a perfectly true and accurate description, and one which clearly and sufficiently distinguishes it from the plaintiffs' water. It was contended that defendants had no right to use the word "Caledonia" at all in designating their water. But, the defendants' springs being at Caledonia, they have a right to say so, taking care to distinguish them from those of the plaintiffs at the same place. *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 27, 37, 38, 39, referred to.

It was also contended that the make-up of defendants' goods was calculated to deceive the public, because the bottles used were similar. But it was not shewn that plaintiffs' bottles were in any way peculiar in form, size, or colour, or different from bottles in common use for the sale of other waters. It was said that it was common to put such goods on ice, and that the labels then came off, and the customer might be deceived, but it is not shewn that defendants did things of that kind. See observations of Lords Macnaghten and Davey in *Payton v. Snelling*, [1901] A. C. 308. Therefore, the whole of the 4th member of the injunction was unwarranted. No part of the 5th member can be maintained as against any of the defendants. None of the defendants, except Tune & Son, has been shewn to have done anything here enjoined, and that part of the judgment allowed to stand against Tune & Son is sufficient as against them.

OSLER, J.A., concurred.

MOSS, C.J.O., dissented, being of opinion that the Chancellor's conclusions of facts were well supported by the testimony. He referred to *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Montgomery v. Thompson*, [1891] A. C. 217; *Reddaway v. Banham*, [1896] A. C. 199; *Radde v. Norman*, L. R. 14 Eq. 348; *Apollinaris Co. v. Morrish*, 33 L. T. N. S. 242; *Worcester v. Locke*, 18 Times L. R. 712; *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal*, 32 S. C. R. 315. He considered that plaintiffs were entitled to an injunction, but that the injunction awarded was not in the proper form. It should be to restrain the defendants, their servants and agents, from selling or offering or exposing or advertising for sale or procuring or enabling to be sold any mineral waters

(not being of the plaintiffs' production) under or in connection with the word "Caledonia," without clearly distinguishing such waters from the plaintiffs' waters.

In the result, the appeal as to all defendants except Tune & Son is allowed with costs and the action dismissed with costs. As to Tune & Son, the appeal is allowed except as to the first clause of the injunction and the reference as to damages. The plaintiffs to have against Tune & Son such costs as they would have incurred in entering up judgment against them by default for so much of the injunction as plaintiffs still retain. Tune & Son to have against plaintiffs the rest of the costs of the action and the costs of appeal. The costs to be set off pro tanto.

WINCHESTER, MASTER.

DECEMBER 5TH. 1902.

CHAMBERS.

WHELIHAN v. HUNTER.

Venue—Change of—Speedy Trial—Postponement of Sittings—Second Application by Plaintiffs for Change.

Motion by plaintiffs for order changing venue. The action was brought by two members of the town council of St. Mary's against the remaining members of that council and the municipal corporation of the town for an injunction restraining defendants from making payments on a contract for waterworks extension; and for a declaration that the contract is not in any way binding upon the corporation, on the ground that no by-law was passed authorizing the execution of the contract; and for other relief. The plaintiffs moved for an injunction against the defendants, and upon the motion were directed to go to trial at the Brampton sittings commencing on the 28th October, 1902, but, not being ready to proceed to trial, they moved to change the venue from Brampton to Stratford, the Stratford sittings being at the time set for the 8th December. The application was opposed by defendants, but an order was made changing the place of trial to Stratford. Afterwards the Stratford sittings was postponed until 13th January, 1903. The plaintiffs now moved for a change of venue to Woodstock, where the sittings was to commence on the 15th December. This was opposed by defendants, on the ground that the council must meet on the 15th December, pursuant to statute, and therefore it would be impossible for defendants to attend at Woodstock.

D. L. McCarthy, for plaintiffs.

J. H. Moss and T. Reid, for defendants.

THE MASTER held that there could be no difficulty, the plaintiffs being willing to set the case down at the foot of the list, so that it would not be called on the first day. It was desirable that the action should be tried this year, while the defendants were still members of the council. Order made changing venue to Woodstock. Costs to defendants in the cause.

WINCHESTER, MASTER.

DECEMBER 5TH, 1902.

CHAMBERS.

PLUMMER v. SHOLDICE.

Parties—Addition of Plaintiff—Distinct Causes of Action—Election to Proceed with One.

Motion by defendant to set aside the statement of claim, or that plaintiffs be ordered to elect as to which claim will be proceeded with. The action was originally begun by plaintiff Plummer alone, and was brought to compel specific performance of an agreement between him and defendant for the sale and purchase of 50 acres of land near the town of Sault Ste. Marie. Before serving the writ of summons, although defendant had entered an appearance gratis, the plaintiff obtained from the local Judge at Sault Ste. Marie an ex parte order permitting plaintiff to amend by adding Marie Brown as a plaintiff, and by adding to the indorsement of the writ a claim for the specific performance of an agreement made between her and the defendant in respect to the same land, and a claim for partition or sale. The writ was amended pursuant to the order, and a statement of claim was delivered, which was afterwards amended.

H. L. Dunn, for defendant.

D. L. McCarthy, for plaintiffs.

THE MASTER.—Each plaintiff has a distinct cause of action against the defendant, and this is improper under Rule 185. *Mooney v. Joyce*, 17 P. R. 241, applied, notwithstanding the change in the Rule. The adding of Marie Brown with her new cause of action will embarrass the trial of the action originally instituted. If plaintiff Plummer is desirous of proceeding with the action as originally brought, there can be no objection to his retaining Marie Brown as co-plaintiff. Order made (as in *Mooney v. Joyce*) that plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same period amend the writ and statement of claim by striking out all parts that refer to the claim of the other plaintiff, save as dealt with above, and that in default the action be dismissed. Costs to defendant in any event.

MACMAHON, J.

DECEMBER 5TH. 1902.

TRIAL.

ST. JEAN v. DANIS.

Gift—Donatio Mortis Causa—Bank Deposit in Names of Donor and Donee—Survivorship—Evidence.

The plaintiff sued as executor of Elmiere Champagne to recover a sum of \$385 on deposit in the Ottawa branch of the Merchants Bank of Halifax, to the joint credit of Elmiere Champagne and defendant. The defence was that the money had been deposited as the joint money of Elmiere Champagne and defendant, and now belonged to the latter as survivor. Elmiere Champagne had, in or about 1900, told the manager of the Banque Jacques Cartier, where the money had been on deposit in the same way, until that bank went into liquidation, that at her death it was to be defendant's, and she had made a similar declaration to one Deverin, her grandson, about six days before her death, saying that it was unnecessary to give defendant an order to that effect. Similar statements had been several times made by the deceased to defendant, who had charge of the bank book, the deceased being at the time of the deposit a woman of nearly eighty years of age. Of eight cheques issued against the account, four were signed by deceased and four by defendant. The deceased had in 1898 made a will bequeathing all her moneys to defendant, but this bequest had been omitted from a will made in 1901, because, as defendant alleged, the defendant had been made a joint owner.

F. H. Chrysler, K.C., for plaintiff.

George F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for defendant.

MACMAHON, J.—The bank book being in possession of defendant, and Mrs. Champagne stating that the money was the defendant's, constituted a good donatio mortis causa. It was not necessary that Mrs. Champagne should require her daughter to produce the bank book in order that she might immediately return it to her again in order to make a good donatio mortis causa. See *Cain v. Moon*, [1896] 2 Q. B. 283; *O'Brien v. O'Brien*, 4 O. R. 450; *Re Weston*, [1901] 1 Ch. 680; *Re Andrews*, [1902] 2 Ch. 394; *Re Dillon*, 44 Ch. D. 76. However, the defendant's right to retain the money might preferably be placed upon the ground that, on the facts found, the money was the joint property of deceased and the defendant, and that it therefore became the property of the

survivor: Williams on Personal Property, 13th ed., pp. 392-3; Payne v. Marshall, 18 O. R. 499.

Action dismissed with costs, including costs of injunction motion.

DECEMBER 5TH, 1902.

DIVISIONAL COURT.

HUNT v. TOWN OF PALMERSTON.

Municipal Corporations—By-law—Aid to Free Library—Necessity for submission to Popular Vote — Special Rate — Construction of Statute.

Appeal by defendants the town corporation from order of MACMAHON, J., granting an injunction restraining them from levying by special rate \$650 in aid of a free library in the town, on the ground that sec. 18 of the Public Libraries Act required the by-law for this purpose to be submitted to a vote of the electors.

J. J. Drew, Guelph, for the appellants.

J. H. Tennant, for defendants the Palmerston Public Library Board.

J. Montgomery, for plaintiff.

BOYD, C.:—The by-law may be upheld under sec. 591 (4) of the Municipal Act, empowering municipalities to make grants in aid of public libraries. Section 18 of the Public Libraries Act first appears in 1895, while the power of municipalities to make grants to mechanics' institutes or free libraries dates back to 1866. Long established law should not be reduced by ambiguous legislation such as the section referred to, which may have its full and legitimate application by being applied to the raising of ways and means by by-laws under the requisitionary powers intrusted to particular free library boards under secs. 14 and 17 of the Act. Sections 14 and 18 are probably to be read together; so that "special rate" is defined to be the "special annual rate" which is to be levied to provide the amount estimated by a free library board as being required to meet the yearly expenses necessary for carrying the Act into effect. The broad distinction between that and the matter in hand is that in that case the library board can enforce its demands upon the municipal corporation, subject to a popular vote, whereas in this instance the question is purely one of bounty and grace on the part of the municipality. Appeal allowed.

MEREDITH, J., gave reasons in writing for coming to the same conclusion.

BRITTON, J.

DECEMBER 6TH, 1902.

WEEKLY COURT.

RE PELOT AND TOWNSHIP OF DOVER.

Municipal Corporations—By-law — Diversion of Road — Interest of Individuals—Contrary to Public Interest.

Motion by Emily Pelot, a ratepayer of the township and an owner of land affected by by-law No. 21 of 1901, for a summary order quashing clauses 1 and 2 of that by-law, which is intitled a by-law to divert part of the Given road in the township, which by-law was passed on the 21st October, 1901, and was confirmed by a by-law of the county council of Kent passed on the 7th June, 1902, as required by sec. 660 of the Municipal Act. The road was used for the purpose of an exit to Big Point road. The by-law provided for the closing up of a piece of the road and the opening up of a piece in substitution for it.

J. H. Moss, for the applicant, contended that the by-law was not passed in the interest of the public at large, but at the instance and for the benefit of Poissant and Gore, two land-owners, and also that the by-law was bad because the notices required by statute were not duly given.

M. Wilson, K.C., for the township corporation.

BRITTON, J. (after setting out the evidence at length):— After a good deal of consideration and with some hesitation. I have come to the conclusion that this by-law was not passed in the public interest, but in the interest of Gore and Poissant, and therefore improperly passed, and cannot stand. It violates the rule, now so well established, that corporate powers must not be exercised for the benefit of one or two individuals at the cost of others, not necessarily at the pecuniary cost, but must not be so exercised as to put many to unnecessary inconvenience for the manifest advantage of one or two: *Pells v. Boswell*, 8 O. R. 680; *Peck v. Galt*, 46 U. C. R. 211; *Morton v. St. Thomas*, 6 A. R. 323; *Hewison v. Pembroke*, 6 O. R. 170; *Vashon v. East Hawkesbury*, 30 C. P. 194; *Romney v. Mersea*, 11 A. R. 712. The by-law is partial and unjust in its operation as between those of the township interested in the road.

In the view taken, it is not necessary to consider the question of notice and advertisement of the by-law. The evidence establishes that there was a formal adjournment of the consideration of the by-law from the 30th September to the next meeting of the council, which was held on 21st October, 1901.

Order made quashing clauses 1 and 2 of the by-law as asked, with costs against the township corporation.

BRITTON, J.

DECEMBER 6TH, 1902.

TRIAL.

SCHIEDELL v. BURROWS.

Fixtures—Machinery in Factory—Rights of Mortgagee—Intention.

Action by plaintiff, a mortgagee, to restrain the removal of certain looms in a carpet factory at Breslau. The plaintiff had been owner of the mortgaged premises, and had used them for a shoddy mill, there being an engine, a boiler, and shafting on the property. The defendant bought the whole, giving back a mortgage in which the engine, boiler, etc., were specifically mentioned, and carried on a carpet manufacturing business, bringing in for the purpose seven looms. These were not in any way attached to the freehold, except by their own weight, but plaintiff contended that they were nevertheless part thereof by reason of their use and from defendant's intention to make them so.

BRITTON, J., held that there was no such intention on the part of defendant that the looms should be used as part of the carpet factory at Breslau as to render it necessary to use them only there. Also, that in these days, when frequent changes take place in the construction of machines, when improvements are constantly made, and at great cost, in machinery of all kinds, the inclination of the Court should be to relax, where possible, in favour of the owner of chattels, rather than carry further, decisions giving to the mortgagee or owner of the freehold machines put in for trade purposes. The result might have been different if defendant had merely purchased the property with the intention of erecting a carpet factory, and without any machinery thereon being specifically referred to.

Action dismissed with costs. Defendant to receive the \$400 paid into Court. Defendant's claim for damages by reason of injunction reserved to be tried at some future time.

DECEMBER 6TH, 1902.

DIVISIONAL COURT.

BEAUDRY v. GALLIEN.

Judgment—Reference by Consent to Experts—Misunderstanding of Counsel as to Purpose of Reference—Opening up Judgment.

Appeal by defendants from judgment of local Master at Ottawa in mechanics' lien action, tried before him, finding \$1,956 due from defendants to plaintiff. The question involved the examination of a great number of items in the

account between the parties, and when the parties were present, ready to proceed with the trial, it was arranged that there should be a reference to two experts to go over the accounts. The experts did so, finding due from defendants to plaintiff the amount for which judgment was given. When the parties again went before the Master, a difference of opinion arose as to what result the examination by the experts was, under the arrangement, to have had. The plaintiff's counsel said it was to be finally binding: the defendants' that the reference was only to ascertain the amounts payable on each item, if correct, leaving defendants to assert that they were not liable for some or any of them. The arrangement had not, at the time, been reduced to writing by either counsel or by the Master, but the latter's recollection of it corresponded with that of plaintiff's counsel, and he entered judgment for the amount found due by the experts.

What the arrangement was, was the only question on the appeal. The appeal was heard by FALCONBRIDGE, C.J., and STREET, J.

G. F. Henderson, Ottawa, for the appellants.

Owen Ritchie, Ottawa, for the plaintiff.

STREET, J.:—The Court can not, under the circumstances, avoid accepting the statement of defendants' counsel that he never agreed to the arrangement which the Master found to have been the one stated to him by counsel. It must be concluded that the parties were not *ad idem*: that there was a misunderstanding. See *Wilding v. Sanderson*, [1897] 2 Ch. 534.

FALCONBRIDGE, C.J.:—I assent with great reluctance. The result is most unfortunate, but is inevitable, unless defendants' counsel is to be held guilty of bad faith.

Judgment set aside and matter referred to local Master for trial unfettered by finding of experts. No costs of appeal.

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DECEMBER 8TH, 1902.

ELECTION TRIAL.

RE SOUTH OXFORD PROVINCIAL ELECTION.

Parliamentary Elections—Corrupt Practices—Hiring Vehicles—Statutory Declarations of Proposed Witnesses — Saving Clause — "Trifling Extent"—Personal Charges against Respondent—Disagreement of Judges.

The particulars of the petition contained 114 distinct charges of corrupt practices. At the trial before STREET and BRITTON, JJ., at Woodstock, evidence was given as to 24 of the charges, the others being abandoned.

G. H. Watson, K.C., and A. G. Slaght, for the petitioners.

S. H. Blake, K.C., and Edmund Bristol, for the respondent.

STREET and BRITTON, JJ., were unable to agree as to two of the charges, one of which was a personal charge against the respondent of having corruptly paid to one Lloyd, the hostler at an hotel, the sum of \$1; and the other of which was the charge of bribery by an agent. The only charge they both held to have been proven was charge No. 6, to the effect that John W. Patterson, whose agency was established to their satisfaction, had hired horses and conveyances from two livery stable keepers in Ingersoll, for the purpose of conveying voters to and from the polls on election day.

STREET, J., referred to the practice of engaging vehicles to drive voters to the polls, and said:—

There is no doubt that at every election numbers of public cabs and livery vehicles are furnished to both sides for the purpose of carrying voters to the polls, and I think I am not

wrong in saying that in most cases these are paid for as soon as it is deemed safe so to do. In other words, the law upon this subject is systematically broken or evaded, and it strikes me as most desirable that some change should be made, and that the use for election purposes of public conveyances kept for hire should either be prohibited absolutely on the day of the election, or their owners should be permitted to let them out on election days at the usual rates of hire.

The hiring of these conveyances by Patterson being the only corrupt practice proved to have been committed in the judgment of both the Judges presiding at the trial, we are asked by counsel for the petitioner to hold that the election is void. In my opinion, however, we must give effect to the saving clause introduced in the Act by sec. 172, which, though not happily expressed, appears to me to be intended to meet such a case as the present, where the corrupt practices proved are of such trifling extent that it cannot reasonably be supposed that the result has in any way been affected by them. Indeed, if we are not to apply it in this case, we must, in effect, hold that the saving clause is practically a dead letter. The proper holding, in my opinion, must be that the corrupt practices proved have not voided the election, and that the respondent is entitled to retain his seat.

As to the question of the propriety of taking statutory declarations from persons giving information of alleged corrupt practices was much discussed during the trial and upon the argument before us, I think I should add a few words with regard to it. The impropriety of taking such declarations has been repeatedly pointed out, and the reasons why the practice is improper stated. When, however, the persons making these declarations are paid sums of money for making them, it is obvious that the impropriety is greatly increased. A new element is then introduced, adding seriously to the difficulty, already sufficiently great, of separating the truth from the mass of perjury which is so common a feature of election trials. It is a practice which is not only improper, but unwise, for it goes far to defeat its own object by necessarily casting an increased amount of suspicion and doubt upon the evidence of all witnesses who state that they have taken bribes for their votes.

The respondent should have the general costs of the petition and trial, but the petitioners may set off their costs of the charges upon which they succeeded, and there should be no costs to either party of the charges upon which we have disagreed.

BRITTON, J.—This is a case where, at the most, whatever disagreement there may have been or suspicion, if any, on the part of either or both Judges, it is found that two corrupt practices by agents of the respondent have been committed. If these were committed with the knowledge of the respondent, then his election is void, but the relieving clause, 174, may be invoked against disqualification. If without the knowledge of the respondent, his election is void unless these corrupt practices were of such a trifling nature or extent that the result cannot have been affected by them altogether in connection with other illegal practices. The corrupt practices proved were the hiring of teams by J. W. Patterson to convey voters on election day. I do not find any evidence to shew that either of these corrupt acts was done with the knowledge of the respondent. Speaking for myself, I must say the evidence of the respondent, if he did not really know of or consent to the hiring of rigs, might have been more full. In dealing with a serious charge of this nature there should be affirmative evidence of the respondent's knowledge or consent, and I do not find that.

Section 172 recognizes that there may be a corrupt practice of a trifling nature which would not affect the result. The question then is: Has this election been reasonably affected by the corrupt practices established at the trial? The vehicles were hired to convey presumably legal voters to the polls. The question of influencing cannot be considered, as one of them was a Liberal and the other a Conservative. As to the application of sec. 172, I have read carefully the sections to which we have been referred. I adopt the language of Mr. Justice Ferguson in the Hamilton Case, 1 Elec. Cas. at p. 524: "As to whether or not the act was of trifling extent, I have difficulty in perceiving just what is meant by the expression, but I do not intend to add to what has been said by so many Judges in regard to the difficulties in construing or understanding this section. The reasoning of the learned Chancellor in the East Simcoe case is applicable in this case. Chief Justice Cameron says the section is pernicious in its effect and calculated to open the door to misconduct in elections, but the section is there, and I am bound to give it effect. . . ."

To deal with this particular case, where the majority was 173, we cannot say otherwise than that the two corrupt acts proved were of such trifling nature and extent that the result cannot reasonably be supposed to be affected by them. I therefore agree with my learned brother in the application of this section.

Moss, C.J.O.

DECEMBER 8TH, 1902.

C.A.—CHAMBERS.

SMITH v. HUNT.

Appeal—To Supreme Court of Canada—Extension of Time—Grounds for Allowing—Negotiations for Settlement—Special Circumstances—Bona Fide Intention to Appeal.

Motion by defendants Hunt and Roberts for an order extending the time for appealing to the Supreme Court of Canada from the judgment of the Court of Appeal (ante 598).

D. L. McCarthy, for the applicants.

F. A. Anglin, K.C., for plaintiff.

Moss, C.J.O.—The judgment of this Court was delivered on the 19th September, 1902. The first proceeding taken toward an appeal was the service on 17th November of a notice of intention to appeal, but, as no such notice was necessary, its service was material only as evidence of the intention it expressed.

The affidavit filed in support of the motion set out that about the end of September negotiations for a settlement were going on, and that these continued until 17th November, when defendants and their attorney spent all day with plaintiff's solicitors, ultimately failing to reach a settlement. Thereupon, as the defendants alleged, plaintiff's solicitors were advised to proceed with an appeal. Notice of appeal was served and leave to serve notice of this motion obtained 20th November.

Upon an application of this nature it lies upon the applicant to shew, among other things, a bona fide intention to appeal, entertained while the right of appeal exists, and a suspension of further proceedings by reason of some special circumstances in consequence of which they are held in abeyance. No such case was made out here. Further, there was no evidence of any communication to plaintiff or his solicitors of any intention to appeal, or any arrangement or any understanding that the time for appealing should not be considered as running during the negotiations. In spite of *In re Manchester Economic Building Society*, 24 Ch. D. 488, where it is said that leave should be granted where justice requires it, no leave should be given here; and in any case no extension should in any event have been granted in favour of the defendant Roberts, who did not appeal from the judgment at

the trial, but as respondent urged some objections to the judgment, chiefly in respect to the jurisdiction of the Court and to costs.

Application of both defendants refused with costs.

FALCONBRIDGE, C.J.

DECEMBER 9TH, 1902.

CHAMBERS.

RE BERGMAN v. ARMSTRONG.

Division Court—Jurisdiction—Action for Declaration of Right to Rank on Insolvent Estate.

Motion by defendant for prohibition to the 1st Division Court in the county of Middlesex against further proceeding on a judgment obtained in that Court against defendant, as assignee of an insolvent, declaring that plaintiff, as an employee of the insolvent, was entitled to rank upon the insolvent's estate for wages earned up to the time of the insolvency, in priority to ordinary creditors.

W. H. Blake, K.C., for defendant.

W. Davidson, for plaintiff.

FALCONBRIDGE, C.J., held that the Division Court had no jurisdiction to entertain the action under the Division Courts Act: Whidden v. Jackson, 18 A. R. 439. It would have been supposed that the amendment made to sec. 22 of the Assignments and Preferences Act (R. S. O. ch. 147) in the revision of 1897, whereby it was provided that in case an action to establish a claim against the estate of an insolvent was brought in the Division Court, the summons should be served upon the assignee, was intended to be of some effect. The question, however, came before Ferguson, J., since the amendment, in a case of Perry v. Laughlin, unreported, and he came to the conclusion that there was no jurisdiction in the Division Court.

Order made for prohibition as asked. No costs, the earlier decision not having been reported.

BOYD, C.

DECEMBER 9TH, 1902.

CHAMBERS.

REX v. HAYWARD.

Criminal Law—Magistrate's Conviction for Theft—Juvenile Offender—Place of Imprisonment—Duration of Sentence—Discharge—Order for Further Detention—Circumstances.

Motion for discharge of prisoner brought up on habeas corpus from the Central Prison. The information was for

stealing eighty cents out of the contribution box in the Congregational Church at Paris. The defendant pleaded guilty before a police magistrate, and was convicted and sentenced to imprisonment for two years in the Provincial Reformatory. The magistrate was informed that the defendant was over seventeen years of age, and this was sworn to on this application. A formal commitment to the reformatory was made out, under which the prisoner was received there, but he was sent thence to the Central Prison without any formal direction.

E. E. A. DuVernet and Gordon J. Smith, Paris, for the prisoner.

Frank Ford, for the Crown.

BOYD, C., held that there had here been a miscarriage, first in sending a boy over 17 years of age to the reformatory, and next in sending him on a sentence of two years to the Central Prison, whereas a sentence of less than two years only should be to the Central Prison, and a sentence for not less than two years to the Penitentiary: Criminal Code, sec. 955; R. S. C. ch. 183, sec. 19. Therefore, upon the papers, no legal authority appeared to authorize the warden of the Central Prison to receive and detain the defendant.

On the question of whether the case was a proper one for further detention, under sec. 752 of the Code, and on a consideration of the facts, bringing the case under Reg. v. Randolph, 32 O. R. 212, the Chancellor held, that the matter fell to be dealt with under sec. 783 of the Code, the correct reading of sec. 785, suggested by the gloss on the margin, being to comprehend summary trial in "certain other cases" than those specifically enumerated in sec. 783. When the case in reality falls under sec. 783 (*a*), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months.

Discharge of prisoner ordered, he having been imprisoned since 2nd October, not being now in lawful custody, and being a first offender. No action to be brought against anyone by reason of imprisonment.

BOYD, C.

DECEMBER 9TH, 1902.

WEEKLY COURT.

LEDUC v. BOOTH.

Will—Construction—Provision for Maintenance of Person—Alternative Provision.

Motion by plaintiff for judgment on the pleadings in an action brought for a declaration of the true construction of

the will of James Eves, and for arrears of an annuity granted thereby. By the will all testator's real and personal property was bequeathed to William Booth (the defendant) on condition that he should pay \$50 per month to the plaintiff, "she also to have the use of the house where I now live." By a codicil the will was varied by providing that if William Booth "in his own absolute judgment is of opinion that it will be best for" the plaintiff "to be cared for in some institution or hospital, . . . then the said William Booth shall have the right . . . to place her in a place where she may receive proper care, attention, and necessaries for one in her condition . . . and may, with the consent of the plaintiff, "remove her to one of the institutions carried on under his direction." After the removal of plaintiff to the hospital the provision as to the plaintiff's occupation of testator's house was declared to be void, and the codicil further provided that the payment of the \$50 per month "shall not be a charge upon my property, real or personal."

J. E. Jones, for plaintiff.

A. Hoskin, K.C., for defendant.

BOYD, C.—In August, 1901, the defendant came to the conclusion, and made it known to the plaintiff, that it would be for her welfare to give up keeping house and take the substituted benefit contemplated by the will and left to be brought into effect by the absolute judgment of the defendant. He was to have the right and authority to place her in a suitable institute, with this limitation, that, if the institution was one carried on under his direction, (i.e., as part of the organization of the Salvation Army) then the removal of the plaintiff was to be with her consent. The will is not to be read as requiring the consent of the plaintiff if the defendant selected an independent and sufficiently adequate house for aged and infirm persons. This he has done in the selection he has made, and he is willing that the plaintiff should take any other place of a similar nature, and not too expensive, if she prefers it.

Judgment declaring defendant to be entitled to possession of the house, and to cease the payment of the \$50 per month, and charging him with no further sum than \$17 per month, since December, 1901; directing him (as in terms of his offer) to allow plaintiff \$15 pocket money, pay her expenses at a home not under his direction, and pay the costs of the litigation.

FALCONBRIDGE, C.J.

DECEMBER 9TH, 1902.

TRIAL.

COTÉ v. MELOCHE.

Mortgage—Default of Payment of Interest—Possession.

The husband of the plaintiff had, before he died, in order to befriend defendant, taken a deed of the land in question in his own name, and executed a mortgage back for part of the purchase money. The mortgagee died, and the plaintiff, not as administratrix of her husband's estate, but out of her own moneys, bought the mortgage and took an assignment thereof from the executors of the mortgagee, who had threatened her with legal proceedings.

The plaintiff now claimed possession of the land.

A. H. Clarke, K.C., for plaintiff.

D. R. Davis, Amherstburg, and F. H. A. Davis, Amherstburg, for defendant.

FALCONBRIDGE, C.J., said that it was very unfortunate that the matter could not have been accommodated without costly litigation. No interest having been paid by defendant since March, 1901, the plaintiff was entitled to possession.

Judgment for plaintiff without costs.

DECEMBER 9TH, 1902.

C. A.

BERTUDATO v. FAUQUIER.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Railway Contractors—Sub-contractors—Question of Liability—Ruling of Trial Judge—Questions for Jury—New Trial.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiffs upon the findings of a jury, for \$900 and costs in an action under the Workmen's Compensation Act and at common law. The plaintiff, who was a workman upon railway construction work, was injured by a stone thrown by a blast. The chief question in the appeal was whether the plaintiff was in fact employed by defendants, who were the principal contractors, or by independent sub-contractors.

The appeal was heard by OSLER, MACLENNAN, MOSS, GAKROW, JJ.A.

E. E. A. DuVernet, for appellants.

A. H. Marsh, K.C., and W. R. Wadsworth, for plaintiff.

On 24th November the Court intimated that the appeal would be allowed and a new trial directed.

Reasons for judgment were afterwards given by

OSLER, J. A.:—The plaintiff, when injured, was at the place provided for the men to sleep and cook their food. The questions upon which the appeal was taken were whether the effect of a contract between defendants and Chambers and Bell was to make the latter sub-contractors for the former, and whether the liability of defendants to the plaintiff was thereby excluded. There is not much room for doubt that the contract in question was in terms a sub-contract for the performance of that for which defendants had contracted, and that, therefore, if at the time of the accident the work was really being carried on under this contract, the defendants would be liable, if at all, only under the provisions of sec. 4 of the Workmen's Compensation for Injuries Act. The evidence would not warrant a recovery under that section, although the sleeping place at which plaintiff was hurt was provided by the defendants, if the defendants were not themselves carrying on the work, since the sleeping place might, as circumstances required it, have been moved according to the best judgment of those actually engaged in control. The more serious question was as to who was in fact carrying on the work, and as to the evidence tending to shew that, whatever was the effect of the sub-contract, the defendants were themselves in actual control. The defendants were entitled to a clear and distinct ruling of the trial Judge as to whether the document they relied upon was, as they contended, a sub-contract. This they did not obtain, and if the document had been construed as would have been proper, namely, as a sub-contract, the distinct issue might then have been presented to the jury, whether it had been abandoned, and whether the work was in fact being done by defendants or by Chambers and Bell independently. The trial was not satisfactory in this regard, and the persons who could have cleared up much of the confusion were not called.

New trial ordered, before which plaintiff may determine on what clause of the Workmen's Compensation for Injuries Act he will rest his case.

DECEMBER 9TH, 1902.

C. A.

DODGE v. SMITH.

Appeal—Leave to Adduce Further Evidence.

Motion by plaintiffs for leave to adduce further evidence on their appeal to the Court of Appeal from the decision of a

Divisional Court, (ante 46, 3 O. L. R. 305) reversing the judgment of the trial Judge, which was in favour of plaintiffs, and dismissing the action.

A. B. Aylesworth, K.C., for plaintiffs.

G. H. Watson, K.C., for defendants.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

MOSS, C.J.O.:—Leave should be given to adduce in evidence the letters referred to on the affidavits, and such explanatory oral testimony as may be deemed necessary, and defendants should be at liberty to answer the evidence adduced by plaintiffs. Evidence to be taken before County Judge of Frontenac and returned by him to this Court, unless parties agree to have it taken at the approaching Assizes at Kingston.

OSLER, J.A.

DECEMBER 9TH, 1902.

C.A.—CHAMBERS.

BAIN v. COPP.

Appeal—Court of Appeal—Leave to Appeal—Grounds—Life Insurance—Title to Moneys.

Motion by plaintiff for leave to appeal from the decision of a Divisional Court (ante 784) affirming the judgment of MACMAHON, J. (ante 706), at the trial, determining in favour of defendants the question of title to £2,500 paid into Court by the Star Life Insurance Company. The company took a mortgage from defendants, who covenanted to take out a policy in the company, to be deposited with them as collateral security. A life offered by defendants having been rejected, they procured one W. L. Bain to apply to the company for a policy, and one was issued in his favour, which was assigned by Bain to the defendants, who paid all the premiums thereon. Bain died, and the company paid the amount of the policy into Court, leaving the question of the right to the money to be determined in this interpleader issue, in which the administrator of W. L. Bain's estate was plaintiff, and the mortgagees, the assignees of the policy, defendants.

Plaintiff applied for leave to appeal on the sole ground that the policy was void under secs. 1 and 2 of the statute of Geo. III.

J. W. McCullough and S. W. McKeown, for plaintiff.

W. N. Tilley, for defendants.

OSLER, J.A.:—If the company had chosen to be dishonest, they might have resisted payment on the ground taken, but, having acted as a respectable company usually does when they

have received the benefit of the premiums, and having paid the money into Court, the statute is out of the question. If the action had been upon the policy, the Court might have taken notice of the illegality and refused relief against the company even if they had not set it up: *Gedge v. Royal Ins. Co.*, [1900] 2 Q. B. 214. It is, however, now a question of the title to the money paid into Court, and all evidence of the origin of the policy is irrelevant. If the plaintiff set up the illegality, and shewed that the policy was void, that would effectually defeat his own title, while the defendants could establish their claim without proof of more than the policy itself. admitted by the Company, and the assignment thereof to them, in view of which it is not easy to see what right the deceased or his administrator could have. *Worthington v. Curtis*, 1 Ch. D. 419, is a satisfactory authority for the view that where the contest is between rival claimants to the policy moneys which the insurance company have paid, without regard to possible defences, the Court will look no further than to the title which they may be able to establish as between themselves.

Motion for leave to appeal refused with costs.

BOYD, C.

DECEMBER 10TH, 1902.

CHAMBERS.

RE ROCHON v. WELLINGTON.

Division Court—Attachment of Debts—Wages of Debtor—Married Man—Proof of Being—Error in Ruling as to Evidence—Prohibition.

Motion by primary debtor to prohibit the clerk of the 4th Division Court in the district of Nipissing from paying over to the primary creditors a greater sum than \$7.03 out of \$32.03 paid into Court by the garnishees, the employers of the primary debtor, the former sum being the whole amount due by them to the primary debtor for wages. The Judge in the Court below decided that, as it was not proved that the primary debtor was a married man, the whole amount should be paid over to the primary creditors.

W. E. Middleton, for the primary debtor.

E. Bayly, for the primary creditors.

BOYD, C.:—All the evidence adduced went to shew that the primary debtor was a married man, with a number of children, whom he supported, and the fact was made out with reasonable clearness and sufficiency as a matter of repute extending over at least four years. The decision below was

not founded upon conflicting evidence, but upon the theory that the best evidence must be given, and that it was essential to produce the debtor (who could not be found) and prove the fact of actual marriage by him. This was a wrong assumption in point of law, by which was nullified the beneficial effect of the exemption as extended to labourers' wages up to \$25 from the effects of compulsory process. Prohibition as asked on authority of *Elston v. Rose*, L. R. 4 Q. B. 5, and *Liverpool Gas Co. v. Everton*, L. R. 6 C. P. 414. No costs.

BOYD, C.

DECEMBER 10TH, 1902.

CHAMBERS.

RE JOHNSTON, CHAMBERS v. JOHNSTON.

Will—Construction—Bequest to One for Use of a Church—Trust—Mixed Fund—Perpetuity.

Motion by executors for directions as to disposition of \$2,000, part of estate of James Johnston. The testator made his will more than six months before his death, thereby directing that land should be sold and out of the mixed realty and personalty, \$2,000 paid to the Rev. N. W. for the use of the Reformed Presbyterian Church. He added that such sum was to be expended by N. W. in the manner best calculated by him to advance the principles of the church.

W. M. Douglas, K.C., for the executors.

D. W. Saunders, for the Reformed Presbyterian Church.

J. G. O'Donoghue, for next of kin.

BOYD, C.:—This is a bequest of moneys derived from the lands, to N. W. as trustee for the church named, and it is valid under sec. 24 of the Religious Institutions Act (R. S. O. ch. 307). The person named having exercised the functions of his trusteeship by granting the fund (as N. W. had done), to the church, there the fund was at home, and should not be disturbed. So far as the \$2,000 came out of personalty no objection could arise as to perpetuity. Costs out of estate.

MACMAHON, J.

DECEMBER 10TH, 1902.

TRIAL.

PHELPS v. McLACHLIN.

Sale of Goods—Refusal of Vendor to Deliver until Payment—Breach of Contract—Damages—Reference.

Action for damages for non-delivery of certain poles, under a written contract, which, as the plaintiff contended,

he could not be called upon to pay, until the poles had been first inspected and passed by both parties, and defendants had supplied the cars and shipped the poles. The defendants contended that if the poles had been on the ground for thirty days and an estimate was made after the thirty days had elapsed, the plaintiff was obliged to make immediate payment; otherwise they (defendants) were not called upon to deliver.

W. R. Riddell, K.C., and R. J. Slattery, Arnprior, for plaintiff.

G. F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for defendants.

MACMAHON, J., held that both parties were wrong in their interpretation of the contract on these points, but that the plaintiff was justified in treating the defendants' letter to him of the 2nd August, in which they refused to load the poles until payment, as a breach of contract to deliver, and in rescinding the contract.

Judgment for plaintiff, with a reference to the Master at Ottawa to assess the damages the plaintiff has sustained from the non-delivery of such poles as defendants had on hand under the estimate (20,000) referred to in the contract, and which would pass inspection.

BOYD, C.

DECEMBER 11TH, 1902.

WEEKLY COURT.

ATTORNEY-GENERAL v. TORONTO GENERAL TRUSTS CORPORATION.

Revenue—Succession Duty—Provisions of Will—Future Estates—Future Enjoyment—Duty not Presently Payable.

Stated case, submitting to the Court the question whether or not the property disposed of by paragraphs 11 to 23 of the will of Hugh Ryan, was presently liable to the payment of succession duty under sec. 12 of the Succession Duties Act. The estate was vested in the Toronto General Trusts Corporation, the trustees and executors, upon trust to collect the income and apply the whole net income for the benefit of the children and children's children for twenty-one years after the death of the testator. At that time, or upon the death of the last surviving child, the capital of the estate was to be divided among the specified members or descendants of testator's family. In the first twenty-one years after the death of the testator, the trustees had a discretion as to the distribution or accumulation of the income, which was to be divided

into fourths: one-fourth being intended for the benefit of each of the four children of testator. After the end of the twenty-one years and before the death of the last surviving child, distribution was to be made, with the accumulations of income, among all the beneficiaries. The children and their families were absolutely entitled to the beneficial use of all the income during the period beginning twenty-one years after testator's death and the death of his last surviving child. During the twenty-one years the children were not absolutely entitled to the whole income from year to year, but the frame of the will was such that the trustees, *in loco parentis*, should exercise a discretion to have each or all supported and maintained with as large an allowance as would be beneficial and advantageous to them, and further that, if the whole income was not expended in its fourfold division, the accumulations should, at the end of the twenty-one years or sooner, be paid to such of the family group, who had been maintained, as the trustees should decide.

G. F. Shepley, K.C., for the Attorney-General.

J. J. Foy, K.C., for the trustees.

E. F. B. Johnston, K.C., for the beneficiaries.

BOYD, C.:—There is a plainly marked future period at which the estate is to be divided. Till then the income is to be applied for the maintenance of the children, and, if not all so applied, is to be accumulated for the benefit of the children at the end of twenty-one years. The scheme of the Succession Duties Act is to provide for a duty on succession to property by persons succeeding to estates or interests in property by testate or intestate title. The Act provides for the present payment of the duty on the present possession or enjoyment of the estate. In the case of future estates, the duty is not to be levied until the person shall come into actual possession by the determination of the prior estate for life or years. Here, there was a prior interest for life or years (according to the event in fact) in which the trustee (*standing in loco parentis*) was entitled to the present income of the property, and was to be so entitled until the time arrived when the corpus was to be divided. The trustee was not entitled to the beneficial enjoyment of this income, but the Act did not use the word "beneficial," though that was found in the new section substituted for sec. 11 (2) in 1901. The trustee, nevertheless, collected and held for the enjoyment and support of the beneficiaries, and the whole of each year's income might be so expended during or at the end of the 21 years. This share of testamentary disposition satisfied the meaning of the statute, that where there was a present enjoyment there

should be a present payment of the duties, based upon the estate or interest which was enjoyed. In this case that was the prior estate for years or the life of the longest lived of the children—after which came the future estate in fee, not now to be levied upon for the payment of duty.

Stated case answered in favour of defendants.

BOYD, C.

DECEMBER 12TH, 1902.

CHAMBERS.

RE NAYLOR.

*Will—Devise in Trust for Church after Expiry of Life Estates—
Time of Making Will—Statute.*

Motion by executors for order declaring the construction of a will, the question presented being with respect to a devise in trust to the Western Circuit of the Bible Christian Methodist Church after the expiry of life estates.

W. E. Middleton, for the executors.

W. F. Kerr, Cobourg, for the Church.

BOYD, C.:—The will was made more than six months before the testator's death. Therefore it was valid under R. S. O. 1877 ch. 216, sec. 19, and since the title of the church first arose on the expiry of the life estates, which was the period of "acquisition" within the meaning of sec. 12 of the Act referred to, the church might hold the land for seven years. Since the devise was covered by this clause of the statute, it did not appear necessary to consider the various cases cited and points urged. Costs out of the estate.

MACMAHON, J.

DECEMBER 12TH, 1902.

TRIAL.

BERRY v. DAYS.

Covenant—Restraint of Trade—Breach—Waiver—Injunction—Damages—Reference.

Action to recover damages for an alleged breach by the defendant of a covenant, contained in a bill of sale of defendant's drug business to the plaintiff and his son, that he (defendant) would not "directly or indirectly engage in the drug business in the village of Lucknow or within a radius of ten miles therefrom during a term of five years: and that he will not open or have part in a third or further drug store in the said village during a term of ten years." The plaintiff subsequently promoted a partnership drug business between his son and defendant, his interest in which, however, the

latter sold, and, as was admitted, opened a third or further drug store in the village.

W. Proudfoot, K.C., and P. A. Malcomson, Lucknow, for plaintiff.

H. Morrison, Lucknow, for defendant.

MACMAHON, J.:—There were two distinct covenants by defendant, one not to engage in a drug business in the village or within ten miles during five years, and the other not to open or have part in a third or further drug store in the village during ten years. By permitting defendant to enter into partnership with his son in an already existing business, plaintiff had waived the breach of the first covenant, but not of the second. See *Barwell v. Inns*, 24 Beav. 307; *Parnell v. Dean*, 31 O. R. 517; *Roper v. Hopkins*, 29 O. R. 584.

Injunction granted restraining defendant from having any part or interest in any third or further drug store in the village of Lucknow during the remaining period of ten years. Reference to the local Master at Goderich as to damages. Costs of action and reference to be paid by defendant.

DECEMBER 12TH, 1902.

ELECTION TRIAL.

RE LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

Parliamentary Elections—Corrupt Practices—Bribery by Respondent—Bribery by Agents—Evidence—Hiring Vehicles—Payment for Vehicles on Polling Day.

Petition tried at Napanee before OSLER and MACLENNAN, JJ.A.

G. H. Watson, K.C., and W. S. Herrington, Napanee, for petitioners.

Walter Cassels, K.C., E. Bristol, and G. F. Ruttan, Napanee, for the respondent.

At the trial judgment was reserved on five charges, numbers 22, 29, 30, 43, 52.

Charge 22 was a personal charge against the respondent of bribery of one Whisken by giving him, at the close of a meeting in a hall at Bath, of which he was caretaker, 50 cents more than the usual fee for his trouble about the hall, and asking him at the same time for his vote.

OSLER, J.A., held that, even if there was a suspicion (which there was not) of the truth of the respondent's denial, the payment of the trifling additional sum over and above what was perfectly legitimate, should, both as to fact and intent, be proved, if not to a demonstration, yet, at the least, so as to produce moral certainty, and even this had not been done.

MACLENNAN, J.A., held that it was impossible to give credence to the account which the respondent gave of the transaction, contradicting the evidence of Whisken, having regard also to the respondent's account of the sum of \$500 received by him from the Conservative Association, and the two sums of \$100 each received by him from Alexander Carscallen and Uriah Wilson respectively, and therefore the charge must be found to have been established.

Owing to difference of opinion, charge dismissed.

Charge No. 29 was as to the bribery of R. T. Jones by the payment to him of \$2.25 to induce him to vote for respondent, or for hire and payment for his employment in carrying voters to the poll in violation of sec. 159 (1) (a) and (c) of the Election Act.

THE COURT held that there was not the least pretence that this was a corrupt payment.

Charge No. 30 was as to a payment to John Smith, similar to that made to R. T. Jones.

Dismissed on the same ground.

Charge No. 43 was as to the payment by James A. Wilson of \$1 to F. W. Parkinson to induce him to vote for respondent. The charge was made by Parkinson and categorically denied by Wilson.

OSLER, J.A., held that as there was no corroboration of Parkinson's statement, or any circumstances which would lead to its being preferred to Wilson's, but rather the contrary, the charge must be dismissed.

MACLENNAN, J.A., held that the fact of the payment ought to be regarded as proved, but that there was no sufficient evidence of Wilson's agency, and that the charge should be dismissed.

Charge No. 52 was as to the hiring by the candidate and his financial agent and other agents, and their payment for or promise to pay for, vehicles to carry voters to and from the poles.

THE COURT held that, although the liverymen had, before the day of the election, charged the candidates more

than they charged at other times for the use of vehicles, this was done to protect themselves from loss by furnishing their conveyances gratis (as they did) to the friends of both candidates on election day, and that although, if the overcharging had been done by arrangement with the candidates or their agents, it would probably have been an unsuccessful attempt to evade the statute, yet as the petitioner had not, as was necessary, made out a clear case on plain evidence of a charge made or intended to be made for the use of the vehicles on election day, the charge against respondent must be dismissed.

DECEMBER 12TH, 1902.

DIVISIONAL COURT.

REX v. MCGINNES.

*Conviction—Motion for Rule nisi to Quash—Untenable Grounds—
Like Motions in Other Cases—Rule Granted on Terms.*

Motion by defendant, on return of a writ of certiorari, for a rule nisi to quash his conviction by a justice of the peace for the county of Simcoe, at Bradford, for an alleged offence against the Master and Servant Act, R. S. O. ch. 157. as amended by 1 Edw. VII. ch. 12, sec. 14, in leaving the employment of one Stoddart before repaying the cost of transportation advanced as wages.

S. B. Woods, for defendant, contended that the information disclosed no offence, or at most the offence of obtaining money under false pretences, over which the magistrate had no jurisdiction, and objected to the conviction on grounds of irregularity.

The judgment of the Court (MEREDITH, C.J., and MACMAHON, J.) was delivered by

MEREDITH, C.J.:—Many of the numerous grounds urged against the conviction are manifestly untenable, and we should have hesitated to grant a rule nisi on any of the objections, but that another Divisional Court, in three other cases arising out of the same circumstances, has granted rules nisi to quash the convictions, and these rules are now pending.

We therefore grant the rule nisi as asked, but it is not to issue until the other cases are disposed of, and then only in the event of the convictions in these cases being quashed; and in that event, if the respondent consents to the conviction in this case being quashed on the same terms, instead of a rule nisi, a rule absolute will go quashing the conviction on these terms.

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DECEMBER 12TH, 1902.

DIVISIONAL COURT.

MONRO v. TORONTO R. W. CO.

Appeal from Ruling of Master in Ordinary—Forum—Weekly Court
—Reference, Stay of, pending Appeal from Judgment of Referee.

Appeal by defendants from an order of STREET, J., in Court, dismissing an appeal by defendants from a certificate of the Master in Ordinary, upon the ground that such an appeal does not lie to a single Judge, but to a Divisional Court; and, in the alternative, appeal by defendants from the certificate of the Master, which was to the effect that he had ruled that the reference in this action should proceed, notwithstanding a pending appeal to the Court of Appeal from the judgment directing the reference.

J. Bicknell, for defendants, contended that the matter in question was one of practice within the meaning of sec. 75 of the Judicature Act, and therefore an appeal lay to a Judge; and that by Rules 827 and 829 the practice now was that the reference was stayed upon security being given on appeal.

W. N. Ferguson, for plaintiff, contra.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MEREDITH, C.J.—The appeal from the ruling of the Master in Ordinary was properly brought before a Judge in the Weekly Court. The question raised was one of practice, and

the statute (R. S. O. ch. 51, sec. 75 (2)) requiring appeals from decisions of the Master in Ordinary to be taken to a Divisional Court, therefore, did not apply.

As to the substance of the appeal, the fact that the defendants were by the judgment directing the reference, ordered, upon partition being made, to convey to the plaintiff the lands allotted to him in severalty, did not bring the case within the exception contained in Rule 827 (2) (b), (c), since the defendants could not deposit the deed or give possession until after the proceedings in the action were practically at an end.

No inconvenience would result from this construction of clauses (b) and (c), for in a proper case it would always be open to the respondent under sub-sec. 2 to get an order imposing upon the appellant such terms as might be reasonable to prevent any injury being done to the respondent by the failure of the appellant to conform to the terms of the judgment as to the execution of the conveyance or the delivery of possession in the event of the judgment being affirmed.

Appeal allowed. Costs in the reference.

DECEMBER 15TH, 1902.

DIVISIONAL COURT.

HOLMES v. TOWN OF GODERICH.

Municipal Corporation — Ordinary Current Expenditure — Right of Corporation to Borrow Money to Use as Security on Appeal — Costs — Appeal for — Status of Plaintiff.

Appeal by plaintiff from judgment of ROBERTSON, J. (ante 367), dismissing the action, which was brought by plaintiff, on behalf of himself and all ratepayers of the town of Goderich, to restrain the defendant corporation, their mayor and treasurer, and the Bank of Montreal, from discounting or in any way dealing with a promissory note (or the proceeds thereof) made to the bank to provide funds to pay into Court \$2,000 as security on an appeal to the Supreme Court of Canada by the town corporation in another action brought against them by the same plaintiff. During the course of the present action the money was paid into Court, and the Supreme Court heard the appeal and allowed it with costs, whereupon the \$2,000 security was taken out

and repaid to the bank. The only question on this appeal was, therefore, as to the costs of this action.

W. Proudfoot, K.C., for plaintiff.

E. L. Dickinson, Goderich, for defendants other than the bank.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.), was delivered by

STREET, J.:—The Court is bound to hear and decide the merits of the appeal: *Fleming v. City of Toronto*, 19 A. R. 318. The plaintiff's personal interest is not a bar to his bringing the action.

On the merits, the town had no power to procure the loan, for two reasons. First, because, looking at sub-sec. 4 of sec. 435 of the Municipal Act, R. S. O. ch. 223, it is clear that in order to ascertain the amount which a municipality may borrow for current expenses under that section, the amount of taxes collected for school purposes in the previous year must be deducted from the whole sum collected, and eighty per cent. of the difference only borrowed. Since the town had in 1900 only collected \$21,774, deducting school rates, they could in 1901 only borrow for current expenses \$17,419, and since, before this loan was made, they had already borrowed \$17,000, this loan caused the legal limit to be exceeded. Secondly, because the borrowing power under sec. 435 (3) is limited to what is required for the ordinary expenses of the municipality, and an outlay which had not been contemplated when the estimates were prepared, and for which no provision, either special or as a possible contingency, had been made in the estimates, could not possibly be deemed part of the "ordinary expenditure" for the year.

Appeal allowed. Costs of action and appeal against defendants other than the Bank of Montreal.

DECEMBER 15TH, 1902.

DIVISIONAL COURT.

PRITCHARD v. FICK.

Contract—Construction—Evidence to Aid—Reformation after Breach.

Appeal by defendant from judgment of STREET, J., at trial at Brantford without a jury, in favour of the plaintiffs for \$684 and costs. The action was brought for damages for non-performance of an agreement by defendant to supply plaintiffs in 1900 with 500 barrels of apples, of which only 196 barrels were delivered. The defendant set up an agree-

ment, made in February, 1901, reciting the previous agreement and default, whereby defendant agreed, in satisfaction of all plaintiffs' claims, to supply them in the autumn of that year with 350 barrels, and in which it was stated that defendant handed over his note for \$100 as a guarantee for the faithful performance of this agreement, and in case of his default the plaintiffs were "to realize the said note for the amount of the same as liquidated damages for such default." The defendant had not delivered the 350 barrels as agreed; the plaintiffs had collected the amount of the note; and defendant now contended that this satisfied all the damages to which they were entitled. The plaintiffs asked reformation of the instrument, if it did not express the true agreement that they were not excluded from their remedy in damages on the first contract. The trial Judge held that it did not do so, and gave judgment for plaintiffs for \$2.25 per barrel for 304 barrels, \$684 in all.

H. D. Gamble, for defendant, appellant.

W. S. Brewster, K.C., for plaintiffs.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.), was delivered by

MEREDITH, C.J.:—It is abundantly clear that the agreement given effect to by the trial Judge was the agreement intended to be entered into by the parties; and if evidence of the correspondence and transactions leading up to it was not admissible to construe the writing, it was admissible for the purpose of reforming it, and it should be reformed. An instrument may be reformed after breach: see *Wood v. Dwarris*, 11 Exch. 493; *Perez v. Oleaga*, ib. 506; *Olley v. Fisher*, 34 Ch. D. 367; *Carroll v. Erie County Natural Gas Co.*, 29 S. C. R. 591. In any event the judgment was right on the proper interpretation of the second agreement as it stood.

Appeal dismissed with costs.

WINCHESTER, MASTER.

DECEMBER 17TH, 1902.

CHAMBERS.

HALLIDAY v. RUTHERFORD.

Administration—Claims of Creditors—Promissory Note—Interest—Corroboration—Open Account—Statute of Limitations—Work and Labour—Release of Claim.

Claims of creditors against the estate of Isaac Rutherford, deceased, were sent in under order of 30th October, 1902,

whereby a lis pendens on property conveyed by the deceased to his wife, the defendant, in his lifetime, was vacated, on the defendant, as administratrix, paying \$300 into Court to abide further order.

F. C. Cooke, for plaintiff.

John MacGregor, for defendant.

THE MASTER:—The claim of the Snowball Waggon Company was admitted.

The plaintiff's claim was for the price of goods sold and delivered and on a promissory note. Only the latter claim was proved, and there was no sufficient corroboration of the claim for interest. Claim allowed at \$96.29 with costs of action on County Court scale.

Geralamy's claim was for \$115, of which \$80 was on a balance of account, \$32 on two promissory notes, and \$3.20 interest on the latter. Only \$1.50 of the open account was not barred by the Statute of Limitations. The running of the time under the statute was not stopped by the delivery of certain shingles by deceased to the creditor, since there had been no appropriation by the debtor to this account: *Ball v. Parker*, 1 A. R. 593; *Friend v. Young*, [1897] 2 Ch. 421, at pp. 432 et seq. Claim allowed at \$36.92 and witness fees.

Sutcliffe's claim was for building a house for the intestate. The claimant's acts, subsequent to the death of the intestate, had had the effect of releasing the estate, the present defendant having assumed the liability in her individual capacity. Claim dismissed with costs.

BOYD, C.

DECEMBER 18TH, 1902.

CHAMBERS.

RE NORRIS.

RE DROPE.

*Lunatic — Committee — Funds in Hands of — Payment into Court —
Reference—Report of Master—Revision of Costs.*

Motions to confirm reports of local Masters at Goderich and Cobourg, respectively, settling schemes for the management of the estates of two lunatics.

C. Swabey and W. F. Kerr, Cobourg, for the respective applicants.

BOYD, C.:—The control of the funds is by the reports left in the hands of the committees. This is in contravention of the settled policy of the Court, and at variance with the usual form of order directing the committee to account yearly for his dealings with the estate, and to pay into Court the balance found in his hands. Injury has in past time resulted from the careless handling of funds by guardians, trustees, and committees, and, though it may seem that greater returns can be had by leaving the investments to be made by such persons, yet, owing to the expense of procuring loans, examining titles, and passing securities, there is no such preponderance of advantage as to countervail the absolute security of the fund when in the hands of the Court. In the case of small estates, which might be barely sufficient, or perhaps insufficient to yield a yearly return for the lunatic's maintenance, and in which it is necessary to collect the personalty and sell the realty, the rule which should be observed by the local officers is that the fund, when realized, shall be paid into Court. Where part of the estate is left for the abode of the lunatic or otherwise, the scheme for dealing with this should be reported to the Court, so that proper directions may be given. In all lunacy matters it is imperative that the costs should be revised under Con. Rule 1167, before the amount is inserted in the report. Direction that in these cases the moneys in the hands of the committees, and to be collected from debtors or from the sale of lands, be forthwith paid into Court. The official guardian to intervene in the usual way.

WINCHESTER, MASTER.

DECEMBER 19TH, 1902.

CHAMBERS.

ANDERSON PRODUCE Co. v. NESBITT.

Foreign Judgment—Action on—Pleading—Defence on Merits.

Motion by plaintiffs to strike out paragraphs of statement of defence setting up a defence upon the merits to an action on a foreign judgment.

D. W. Saunders, for plaintiffs.

W. B. Northup, K.C., for defendant.

THE MASTER held that, on the authority of *Hollender v. Ffoulkes*, 26 O. R. 61, in which a Divisional Court refused to follow *Woodruff v. McLennan*, 14 A. R. 242, and permitted a defence upon the merits to be set up, the application must be refused.

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BOYD, C.

DECEMBER 22ND, 1902.

TRIAL.

LOCKHART v. LOCKHART.

Deed—Action to Set aside—Improvidence—Family Settlement—Costs.

Action to set aside a conveyance of all her land and goods in the county of Haldimand by the plaintiff, then seventy-eight years old, to her son and his children.

W. D. Swayzie, for plaintiff.

S. C. Macdonald, Dunnville, for defendant Norman M. Lockhart.

F. W. Harcourt, for infant defendants.

BOYD, C.:—It was not proved that the deed was read over to the plaintiff, and the circumstances surrounding the transaction disclosed improvidence on the plaintiff's part. There was no provision for maintenance, or at least no written agreement to manifest it, and no security for its performance. The house of the adult defendant was no home for the plaintiff, and having given away all her property she ought to be in a position to enforce greater comfort in her old age. The plaintiff's offer to be satisfied with the return of the lands and chattels without any mesne profits appears to be a proper solution of the controversy. The defendant had made no improvements worthy of serious consideration. Conveyance set aside, and land vested in plaintiff; chattels to be returned in specie. As the matter was in the nature of a general settlement of a family controversy, no costs.

DECEMBER 22ND, 1902.

DIVISIONAL COURT.

GRAINGER v. HAMILTON.

Seduction—Evidence—Action Brought for Daughter's Benefit—Judge's Charge—Credibility of Witnesses—Rejection of Evidence—No Substantial Miscarriage.

Appeal by defendant from judgment of FERGUSON, J., entered pursuant to the findings of the jury in favour of the

plaintiff in an action for seduction. The appeal was taken on the grounds that the defendant should have been allowed to cross-examine the plaintiff's daughter to shew that the nominal plaintiff had no interest in the action, but that it was brought for the daughter's benefit alone, and to shew the contents of certain letters written by her to a doctor and others, and to cross-examine plaintiff's wife to shew that plaintiff had been unduly intimate with other women subsequent to his marriage. Objection was also made to the charge.

G. F. Shepley, K.C., for defendant.

F. A. Anglin, K.C., for plaintiff.

BOYD, C.—The appeal must be dismissed. The attempt to prove that the action was brought colourably by the father and really by the girl, was not admissible, the issue not having been raised. The further evidence was also rightly rejected as being irrelevant on the present record. The Judge's remarks as to alibi were corrected and made sufficiently plain after objection raised, and were probably plainly enough put at the close of the main charge. There had been plenty of evidence to justify the verdict.

MEREDITH, J.—The evidence rejected was not admissible on the ground urged in support thereof at the trial, but was admissible as affecting the credibility of witnesses. No substantial wrong or miscarriage was, however, occasioned. The case was clearly one for the jury.

Appeal dismissed with costs.

DECEMBER 22ND, 1902.

DIVISIONAL COURT.

DUNLOP PNEUMATIC TIRE CO. v. RYCKMAN.

Pleading—Counterclaim—Exclusion of—Defendants to Counterclaim out of Jurisdiction—Foreign Trade Mark, Subject of Counterclaim—Hardship—Injustice.

Appeal by defendants the Dunlop Tire Co. from order of STREET, J. (ante 699), reversing order of the Master in Chambers and striking out certain paragraphs of the statement of defence and counterclaim of the appellants. The action was brought by the English company to restrain the appellants from exporting tires from America and competing with plaintiffs in other parts of the world. The defence of the Canadian company set up certain rights against the plain-

tiffs under agreements of 13th December, 1898, and 27th January, 1899, and also certain rights under the same agreements as extended by means of certain representations. By the counterclaim they alleged a breach of one of the agreements which they asked should be specifically performed, and set up a further claim based upon certain representations, asking, in that regard, a rectification of the agreements. They further alleged a conspiracy by plaintiffs with certain others, resident out of the jurisdiction, to defraud the defendants out of the beneficial use of the trade mark in Australia, relying on the agreements and the representation by which they were extended.

G. F. Shepley, K.C., for appellants.

A. B. Aylesworth, K.C., W. M. Douglas, K.C., and John Greer, for plaintiffs and defendants by counterclaim.

BOYD, C.—As to the last counterclaim, the only measure of relief was in damages, which it was nowhere alleged could not be recovered from the British company, and it was not needful for the ends of justice to bring in the new parties to the counterclaim, of which the inevitable effect would be to complicate an inquiry already promising to be cosmopolitan in its scope. Upon the well defined and separable litigation on equitable grounds for specific performance and rectification, the defendants were seeking to engraft the common law action for conspiracy against strangers to the record, and for the reasons given in *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, such amalgamation should not be allowed. See *S. C.*, [1898] 1 Ch. 197. Order appealed from affirmed with costs, with leave to apply to amend the equitable claims as against the parties to the original record.

MEREDITH, J., concurred.

DECEMBER 22ND, 1902.

DIVISIONAL COURT.

HOLTBY v. FRENCH.

Mechanics' Liens—Defect in Building—Assent—Estoppel.

Appeal by defendant Edwin French from judgment of J. A. McAndrew, Official Referee, in action under Mechanics' Lien Act, finding plaintiffs entitled to recover \$679 for work done by them in the brick-work of a stable. The defence

urged was that the work had not been completed according to contract, because the east wall of the building was not plumb, but at a certain point projected towards the east, to the extent of about two inches. The referee gave judgment in favour of plaintiffs.

C. A. Masten, for appellant.

N. W. Rowell, K.C., for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—Though the evidence was involved and very conflicting, a perusal of it leads to the conclusion that the bulge was the result of something done by the defendant and his employees in putting up a heavy cross-beam. The bulge was discovered shortly after the beam had been put up, and the mischief might then have been set right for a trifling sum. The plaintiffs proposed gradually to bring the portion of the wall yet to be built into line with the bottom, and to this the defendant assented, so that he is now estopped from setting up his present contention. He had practically acceded to the plaintiffs' view of the cause of the defect.

After the completion of the contract he promised to pay the plaintiffs, and made no complaint on this subject until they had registered a lien.

Appeal dismissed with costs.

FALCONBRIDGE, C.J.

DECEMBER 23RD, 1902.

CHAMBERS.

HAY v. BINGHAM.

Defamation—Pleading—Statement of Claim—Setting out whole Newspaper Article—Parts not Referring to Plaintiff—Innuendo.

Appeal by plaintiff from order of local Master at Ottawa striking out paragraph 4 and part of paragraph 5 of the statement of claim in an action for libel and slander. The defendant was a candidate in the Liberal interest for the representation of the city of Ottawa in the Ontario Legislature at the general election in May, 1902, and the plaintiff was a supporter of the Conservative candidate at such election. Paragraph 4 stated that the defendant was defeated at the election, and on the following day, the 30th May, 1902, falsely and maliciously caused to be printed and published in the form of an interview in the issue of the "Free Press"

newspaper, of and concerning the plaintiff the words following: "Mr. Bingham on the Result." Then followed an account of an interview with Mr. Bingham, containing, among other things, these words: "Mr. R. G. Hay" (the plaintiff) "was another that came to me after it was known that I was a candidate. He wished me to indorse a note for him for \$1,000 to start an establishment on Bank street. I said to him that I would consider the matter, and remarked: 'Won't you be lonesome out of politics?' He said that he had gone out of politics. I afterwards declined to accede to his request, and he later on accused me of breach of loyalty, etc." The other portions of the interview were set out in the statement of claim, but did not refer to plaintiff. Paragraph 5 contained the innuendo, and the part struck out by the Master was a part which did not refer to any statement made with regard to plaintiff.

T. McVeity, Ottawa, for plaintiff.

Glyn Osler, Ottawa, for defendant.

FALCONBRIDGE, C.J.—Rules 268 and 275 have no relation to the setting out of the matter complained of in an action of defamation, because in that form of action the very words complained of must be set out by plaintiff: *Wright v. Clements*, 3 B. & Ad. at p. 506. It is not sufficient to give the substance or purport of the libel or slander with innuendoes: *Odgers*, 3rd ed., p. 553: the words must be set out verbatim. Generally speaking, it is not necessary to set out the whole of an article containing libellous passages, provided that nothing be omitted which qualifies or alters the same: *Odgers*, p. 534, and cases cited. The libel itself must be produced at the trial, and defendant is entitled to have the whole of it read. But a defendant cannot object to the whole article being set out in the statement of claim. The pleading does not offend against Rule 298, nor is it scandalous, nor does it tend to prejudice, embarrass, or delay the fair trial of the action. *Days v. Brundage*, 13 How. Pr. 221, *Millington v. Loring*, 6 Q. B. D. 190, 194, and *Whitney v. Moignard*, 24 Q. B. D. 630, referred to. The words of paragraph 5 struck out were properly struck out. They were not fairly pleaded as innuendo, and did not refer to plaintiff.

Appeal allowed as to the 4th and disallowed as to the 5th paragraph. Costs of appeal to be costs in the cause.

MACMAHON, J.

DECEMBER 23RD, 1902.

TRIAL.

MOORE v. BALCH.

*Limitation of Actions—Promissory Notes—Commencement of Statute
—Absence of Defendant from Province—Return.*

Action tried at Kingston without a jury. The plaintiff's claim was on three promissory notes made by defendant to him, the first being dated 10th May, 1889, payable one year after date, and the others 3rd March, 1892, payable at one and six months after date respectively. All three notes were made at Kingston, whence defendant went in September, 1893, to live at Syracuse, New York, where he lived thenceforward. During the summer of 1894 he was in Kingston for a week on a visit, and in the following year spent two weeks in the city and vicinity. The notes were proved to have been made by defendant, and at the trial the claim on the first was abandoned by plaintiff.

T. L. Snook, Kingston, for plaintiff.

John McIntyre, K.C., for defendant.

MACMAHON, J.—The second and third notes had matured before defendant's removal to Syracuse, and, since the plaintiff's cause of action accrued before the departure of the defendant, the statute began to run and was not suspended by his subsequent removal from the jurisdiction: *Homfray v. Scrope*, 13 Q. B. 509-512; *Rhodes v. Smethurst*, 6 M. & W. 351. In any event he returned to Kingston in 1894 and 1895, and there remained for a length of time amply sufficient for the holder of the notes to have brought action. The claim of the plaintiff was, therefore, barred long before this action was brought on 12th August, 1902.

FALCONBRIDGE, C.J.

DECEMBER 23RD, 1902.

TRIAL.

RYAN v. RYAN.

Waste—Cutting Timber—Injury to Reversion—Injunction—Damages.

The plaintiff's claim was against the defendant for damages for cutting wood upon land of which plaintiff's mother was life tenant and plaintiff himself reversioner.

T. Wells, Ingersoll, for plaintiff.

J. C. Hegler, K.C., and J. H. Hegler, Ingersoll, for defendant.

FALCONBRIDGE, C.J.—Although the evidence offered by plaintiff was too vague and inconclusive to warrant a finding, the evidence of defendant and his mother shewed that defendant had taken from the land of which plaintiff was reversioner, and converted to his own use, about five cords of rough wood annually for firewood. That he had replaced this by better wood from his own land did not help him, since the life tenant could not, without being impeachable of waste, sell or barter away any wood which she might use herself: *Saunders v. Breakie*, 5 O. R. 603. As defendant avowed his intention of continuing the practice, an injunction is granted against this particular mode of dealing with wood on and from the land of which plaintiff is reversioner. Damages assessed at \$25. Costs to plaintiff on County Court scale without set-off.

DECEMBER 23RD, 1902.

DIVISIONAL COURT.

BREESE v. CLARK.

District Court — Jurisdiction — Counterclaim — Work and Labour — Amount — Deterioration — Damages — Set-off — Costs.

Appeal by plaintiff from judgment of District Court of Muskoka whereby the claim of plaintiff for moneys due to him on a contract with plaintiff for sawing logs was found at \$209.59, but the defendant was allowed by way of set-off and counterclaim for bad sawing and deterioration of logs a sum of \$597, and whereby judgment was directed to be entered for defendant for the balance over plaintiff's claim. The appeal was taken on the ground that the amount allowed upon the counterclaim was in excess of the jurisdiction of the District Court, and on the facts.

E. E. A. DuVernet, for plaintiff.

R. U. McPherson, for defendant.

THE COURT (BOYD, C., MEREDITH, J.), held that it would be proper to reduce the amount to be allowed for bad sawing to \$150, and to treat this as a matter of mere defence, deducting it from the \$209.59 due plaintiff, thus arriving at a balance of \$59.59. On the counterclaim proper for deterioration of logs, the amount which on the whole evidence it would be proper to allow would be \$150, the amount allowed below having been beyond the jurisdiction. Deducting the \$59.59, there was left a balance in defendant's favour of \$90.41, for which sum judgment should be entered. Success having been divided, no costs of action or appeal to either party.

MEREDITH, J.

DECEMBER 24TH, 1902.

CHAMBERS.

RE BUTLER.

Will—Construction—Distribution of Estate—Income—Corpus.

Motion by executors upon an originating notice under Rule 938 for an order declaring the construction of the will of Peter Butler, by which all the residue of his property was devised upon trust to the executors to convert into money, and, after payment of an annuity, to pay the residue of the income annually in equal shares to his children Ephraim, Philip, George, Jane, Ann, and Sidney, during their lives. The will directed that the share of any of the said children dying without issue should be divided among "all my surviving children," and that the "share of interest of any of my children" who died leaving issue should be divided equally among the children of the deceased child until the final division. After the death of the last surviving of the six children mentioned by name, the corpus was directed to be divided into six parts and one part paid to the children of each of the said deceased children in equal shares. There was a seventh child of testator's not mentioned in the will except to be named as executor. He had died, leaving six children, and of the six children named as beneficiaries five were dead, four leaving issue, and one (Sidney) without issue.

W. E. Middleton, for the executors.

D. W. Saunders, for the assignees of George Butler.

D. L. McCarthy, for the representatives of Peter Butler.

F. W. Harcourt, for unborn children.

T. G. Meredith, K.C., for others interested.

MEREDITH, J.—The questions and the answers to them are as follows: 1. Are the children of Peter Butler entitled to share in Sidney's share of the income? They are so entitled. The will properly referred to the share of "any of the said children" being divided among all my surviving children, which prima facie included Peter, and this construction was assisted by the subsequent provision that the share of interest of "any of my children" (which again prima facie included Peter) dying leaving issue should until the period of distribution be divided among the children of that child. No violence was done to the words "share of interest" by holding them applicable not only to the main share of interest of one of the named six, but also to Peter's share of the share of one of the six dying without issue. To construe

the gift of the share of interest of a child dying without issue to the "surviving children" at the time of the payment would not be consistent with the intention of bounty to the grandchildren or the directions to pay the shares among the children share and share alike and to pay the share of a child leaving issue to his children.

2. How is Sidney's share of the corpus to be divided? There is an intestacy as to Sidney's share, the children of each child being the only beneficiaries of the corpus.

3. May the estate now be divided? Except as to Sidney's share, which must be retained until the death of the last surviving named child in order that Peter's children may share in the income therefrom, there is no reason why their proper shares of their parent's shares may not be paid to such of the grandchildren as are of full age.

Order to go upon any of the questions submitted. Costs of all parties out of the fund, those of the executors as between solicitor and client.

C. A.

DECEMBER 24TH, 1902.

MURPHY v. LAKE ERIE AND DETROIT RIVER
R. W. CO.

*Contract—Construction—Removal of Timber—Injunction—Refusal—
Appeal—Court Expressing no Opinion on Merits—Affirmance of
Refusal.*

Appeal by plaintiffs from order of LOUNT, J., in the Weekly Court, dismissing the plaintiffs' motion for an interim injunction to restrain the defendants from removing from Great Duck Island in Lake Huron, owned by plaintiffs, certain timber cut by defendants prior to 1st January, 1902. LOUNT, J., held that upon the true construction of the agreement between plaintiffs and defendants the cedar timber cut by the defendants before 1st January, 1902, but not removed at that date, belonged to defendants and might now be removed, notwithstanding the express provision for removal prior to 1st January, 1902, contained in the agreement.

F. A. Anglin, K.C., for the appellants, contended that, on the true interpretation of the offers contained in the letters of the plaintiff Murphy of 19th January, 1899, and 15th September, 1899, addressed to defendants, and by them accepted, the words "to be cut and removed . . . until 1st January, 1902," were words limiting and defining the quantity of

cedar timber sold by plaintiffs and bought by defendants; that by the agreement the removal of the timber was made a condition precedent to its becoming the property of defendants.

W. H. Blake, K.C., for defendants, opposed appeal, and relied on *McGregor v. McNeil*, 32 C. P. 538.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.) was delivered by

MOSS, C.J.O.—We think that in the present position of this case we should not now express a definite opinion upon the contract between the parties. The case is not ripe for final decision upon the construction of the agreement in question. The facts shewn are very meagre. It was quite open to the learned Judge whose order is under appeal to refuse an injunction on the sole ground of preponderance of convenience, and there is nothing before us on which we could say he erred in so disposing of the motion. . . . We desire to leave the case so that it may be dealt with at the trial entirely unembarrassed by any expression of opinion. . . . We think the proper order to be now made is to dismiss the appeal; the costs to be disposed of by the trial Judge.

DECEMBER 24TH, 1902.

C. A.

McGIBBON v. CHARLTON.

Contract—Delivery of Timber—Correspondence—Evidence—Non-completion of Contract.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing with costs the action brought by appellants to recover damages sustained by them by reason of an alleged breach by respondents of their contract with appellants to deliver 200 M. feet of white pine and between 250 M. and 300 M. of Norway pine.

J. Cowan, Sarnia, for appellants.

H. L. Drayton and A. G. Slaght, for defendants.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.) held that the Judge below was right in the conclusion that there was not sufficient evidence of the contract sued on, which was founded upon a correspondence, a perusal of which shewed that neither of the parties regarded their negotiations as having reached a conclusion.

Appeal dismissed with costs.

DECEMBER 24TH, 1902.

C. A.

ARMSTRONG v. TORONTO POLICE BENEFIT FUND.

Benefit Society—Pension—Vested Right—Alteration in Rules—Validity of,

Appeal by plaintiff from judgment of STREET, J. (30th April, 1901), declaring that the moneys paid into Court in this action by the defendants were sufficient to satisfy the plaintiff's claim. Plaintiff was a member of the Toronto Police Force from 15th March, 1872, till the time of his resignation on 15th May, 1900. Defendants were a friendly society organized 3rd December, 1881, to insure against death and to grant life-time benefits. Under rules 23 and 24 of the society, plaintiff claimed a pension for life of one-half of his pay.

In calculating the period of service, upon which the right to the pension depended, rule 23 of the society was relied on. It stated that members who were on the force prior to 1st January, 1882, were entitled to reckon two-thirds of the period of their service, anterior to that date. The rules of the society were amended in December, 1894, and by the amendment the period required to entitle a member to the pension claimed by plaintiff was increased from 20 to 25 years, and, consequently, defendants contended that plaintiff, having served only 24 years and 5 months, was not entitled to the pension claimed.

E. E. A. DuVernet and N. F. Davidson, for appellant.

A. B. Aylesworth, K.C., and D. T. Symons, for defendants.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) held that the amendments were valid and binding upon the plaintiff. There was no question of vested interests involved. The plaintiff had acquired no absolute right to a pension at the time of the amendment in 1894. His rights continued to be the same as those of all other members of the society until he acquired a vested right under the rules in force at the time, and the sum to which he had become entitled had been paid into Court.

Appeal dismissed with costs.

DECEMBER 24TH, 1902.

C. A.

CITY OF OTTAWA v. OTTAWA ELECTRIC R. W. CO.

Street Railway—Agreement with Municipality—Specific Performance—Bond—Injunction—Reference as to Damages—Transportation of Freight—Resolution of Council—Statutes.

Appeal by plaintiffs from judgment of BOYD, C. (17th June, 1901), after the trial of the action at Ottawa, directing a reference for the purpose of ascertaining what damages the plaintiffs had sustained by reason of the failure of defendants to build and put in operation the line of railway on Bell street, in the city of Ottawa, and in other respects dismissing the action, which was brought to compel specific performance of certain agreements between the plaintiffs and defendants, and for an injunction restraining defendants from carrying freight and running freight cars upon their line of railway on Sussex street, and on other lines in the city. The Chancellor held that the power to carry freight on the streets by electricity was an employment of new and additional power conferred by the statutes of Canada, 1892, and was to be brought into operation according to the provisions of the Ontario Street Railway Act, which were that it must have been sanctioned by a by-law of the municipality. But the provisions of the Street Railway Act did not apply to any company incorporated before the 1st February, 1883. The Ottawa City Passenger Railway Company (now incorporated with the plaintiffs) had from the first had power to transport freight on their lines by horse or animal power, and new facilities were given to it afterwards by the Dominion Parliament to carry freight by means of electricity. Then the Dominion Act of 1892 provided that the new power was to be exercised on such terms as the city council approved. Having regard to the earlier Act of 1868, sec. 2, the city council might, by resolution, permit the use of freight cars during the day time. Its approval of such use of the tracks for freight during the day was to be manifested by resolution, and the like approval for the carriage of freight at night might fairly be regarded as sufficient. The council had given their sanction by resolution to connect the lumber-yard of the Edwards Company with the track on Sussex street, and the city had also made connections at the other end of Sussex street. This had been the method of operating one part of this track on Sussex street since 1896, and, in the absence of any evidence that the resolution had been rescinded, or other act of disapproval equally notorious, the action failed on this

branch. On the branch of the case referring to the operation of cars on Bell street, the Chancellor held that it was not a case for specific performance, but directed a reference as to damages.

A. B. Aylesworth, K.C., and Taylor McVeity, Ottawa, for plaintiffs, appellants.

F. H. Chrysler, K.C., for defendants, supported the Chancellor's judgment on the Sussex street branch of the case, and on the other branch supported a cross-appeal from the part of the judgment directing a reference.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A.) held that in the face of the stipulations in the Act of Parliament giving defendants the right to use electricity, they could not ignore the provisions of the Street Railway Act. The resolution of the council giving the defendants leave to connect their lines with those of the Canadian Pacific and Canada Atlantic railway companies, and allowing the connection with the Edwards Company yard, did not give the defendants the rights contended for. The provisions of sec. 546 were imperative, and the power conferred upon the municipality must be strictly exercised: *Winter v. McKeown*, 22 U. C. R. 341, at p. 347; *Re Ostrom and Township of Sidney*, 15 A. R. 372.

The effect of sec. 17 of the Street Railway Act had been overlooked below. The defendants had failed to make out a valid permission and could not, therefore, carry freight on their lines through the city. On the claim for specific performance, the reasons given in *City of Kingston v. Kingston*, etc., *Street R. W. Co.*, 25 A. R. 399, for refusing it, applied, and the plaintiffs could not enforce the bond against defendants, the city having given up its rights thereunder. Further, the city not having seriously followed up its claim for damages, and it being doubtful if any could be established, there should be no reference as to damages in this action.

Appeal allowed as to the freight, and defendants enjoined from transporting or carrying freight or running freight cars over their lines by electricity till the city's permission has been obtained. Appeal dismissed as to other branches. Cross-appeal allowed as respects the reference as to damages, to the extent indicated. Costs of action to plaintiffs. No costs of appeal or cross-appeal to either party.

DECEMBER 24TH, 1902.

C. A.

ONTARIO BANK v. POOLE.

*Promissory Note—Specific Purpose—Authority—Bank—Consideration
—Advances—Collateral Security—Negotiation.*

Appeal by plaintiffs from judgment of ROBERTSON, J., 1 O. W. R. 20, dismissing the action with costs. The action was brought upon a promissory note for \$1,500 made by James Poole, the defendant, in favour of the plaintiffs. It was one of a number of notes made by the shareholders of the Consolidated Pulp and Paper Company in connection with an advance sought from the plaintiffs for the purposes of the company. The defence was that the note was given for a specific purpose, known to the plaintiffs, and that the plaintiffs never made the advance and gave no consideration for the note. The trial Judge held that certain advances made by the plaintiffs to the company did not form a consideration for the note; that the note was never negotiated, and the plaintiffs were not holders in due course; that they held the note without consideration, and for a purpose other than the defendant intended when he signed it.

The appeal was heard by OSLER, MACLENNAN, MOSS, J.J.A.

J. H. Moss and C. A. Moss, for plaintiffs, contended that the uncontradicted evidence established that the note was delivered to them in consequence of, and as a substantial factor in, the making of an agreement between plaintiffs and the officers of the pulp company, which advances were actually made; that the delivery of the note to plaintiffs was an integral part of the consideration upon which the plaintiffs entered into the agreement, and the making of this agreement by plaintiffs was a sufficient consideration for the note; that the note was delivered to plaintiffs by the defendant's agent, having apparent authority in that behalf, and the plaintiffs became holders in due course, without notice of any limitations or conditions attached to it in its inception, and the plaintiffs were not affected thereby; that it was immaterial whether the note had been negotiated or not, but the plaintiffs were holders in due course.

F. E. Hodgins, K.C., and J. D. McMurrich, for defendant, contended that the note was used as it was without the authority of defendant, and that plaintiffs had notice.

Moss, C.J.O.—It is clear upon the evidence that the main and leading purpose of making the thirteen promissory notes

of which the defendant's was one, was that they might be employed to procure funds from the bank for the purposes of the company. There was special necessity at the time for an immediate advance to relieve the company from pressing liabilities upon which actions were threatened and imminent. It is true that amongst the makers themselves the form of the transaction was referred to as a discount of the notes, but that may be regarded as a mere form of speech. They were not considering the form so much as the substance, which was the obtaining of the advance. The form the transaction took could make very little difference to the makers. They were becoming liable on the notes in order that they might be used with the bank in procuring the needed funds. Whether the money was advanced directly on the notes or whether it was advanced in consequence of their having been given to be held as collateral security, was immaterial. The advances were made as much upon the faith of the notes as upon the other securities, and there was ample consideration to the makers. The appeal should be allowed.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

OSLER, J.A., concurred.

DECEMBER 24TH, 1902.

C. A.

AILLO v. FAUQUIER.

GALLIO v. FAUQUIER.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence of Foreman of Works—Questions for Jury—New Trial—Small Verdict.

Appeal by defendants, contractors on the Algoma Central Railway, from judgment of BRITTON, J., in action tried before him with a jury at Sault Ste. Marie, in favour of plaintiffs for \$375 and \$75 respectively. The plaintiffs were workmen on the railway, employed in rock blasting. Two charges had been set, and, as it was supposed, fired. Only one, however, had in fact exploded, and in working at the tamping of the unexploded charge the plaintiffs were injured. On returning to work after the blast the plaintiffs had suggested to their foreman that one charge had not gone off. He was, however, of a contrary opinion, and told them that if they refused to continue to work they would be dismissed from their employment. He then proceeded, assisted by the plaintiffs, to remove the tamping with a steel drill.

He was himself injured more seriously than either of the plaintiffs in the explosion which followed. The jury found that the foreman was negligent in using a steel drill, instead of a wooden tool; and upon their finding judgment was entered for plaintiffs.

The appeal was taken upon the grounds: (1) that plaintiffs knew and appreciated the risk, and entered upon the work determined to accept it; (2) that there was no evidence of any negligence on the foreman's part.

A. B. Aylesworth, K.C., for defendants, appellants.

Edward Martin, K.C., for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, J.J.A.) was delivered by

OSLER, J.A.—The verdicts in these cases are small, and unless there is no evidence to support them, or a clear case of misdirection or nondirection made out, we ought not to interfere—quite as much in the interest of defendants themselves as of the plaintiffs, as it is manifest that a new trial would be of little service to the former. . . So far as there was danger incident to the doing of the work in a proper way, the evidence of plaintiffs themselves might tend to shew that they accepted it, though the jury might take the other view, if they believed their evidence that Crocco (the foreman) told them to do the work on the peril of being discharged. And if the case rested on this alone, it may be that we should have found ourselves compelled to grant a new trial, as the learned trial Judge, though asked to do so, did not put a question to the jury as to whether the plaintiffs were volentes in doing the work, assuming that it was done in a proper manner—the question of Crocco's negligence from that point of view being whether he knew, or took no pains to inform himself, whether the blast had exploded or not. But there is evidence that Crocco proceeded to withdraw the tamp in an improper and unusually dangerous manner, namely, by means of a heavy steel drill, an instrument which ought not to have been used for the purpose, and striking and pounding this drill in the hole. He ordered the plaintiffs to work with him with this instrument and in this manner. Of the special and increased danger which was thus caused it does not appear that plaintiffs were aware, and there was, therefore, a case proper to be submitted to the jury under sec. 3, sub-sec. 2, of the Workmen's Compensation Act, whether the plaintiffs had sustained injury by reason of the negligence of a person in the service of the employer who had superintendence intrusted to him, while in the exercise of such superintendence. The trial

Judge was not asked, and I think there was no ground for asking him, to submit any question as to plaintiffs having accepted the special risk of danger arising from that negligence, though, as I have said, it might have been otherwise had the case turned alone upon the question whether Crocco was negligent in not having satisfied himself whether the blast had or had not gone off.

Upon the whole, I think it is proper to dismiss the appeals. Costs follow.

DECEMBER 24TH, 1902.

C.A.

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

Drainage Referee—Official Referee—Reference.

Appeal by defendants from order of a Divisional Court, 1 O. W. R. 274, 4 O. L. R. 97, allowing an appeal by plaintiffs from an order of MEREDITH, C.J., dismissing plaintiffs' application for an order referring these actions to the Drainage Referee as an official referee. The statements of claim set forth certain demands which were the subject of proceedings before the Drainage Referee alone under the Municipal Drainage Act. Combined with these were demands and causes of action over which the Drainage Referee, as such, had no jurisdiction, and which were properly the subject of an action. After action brought, the plaintiffs took the proper steps to bring the former before the Drainage Referee in the manner prescribed by the Act, and then moved for an order to refer all the matters arising in the actions to the Drainage Referee, as an official referee, under sec. 29 of the Arbitration Act.

MEREDITH, C.J., held that the Drainage Referee was not an official referee within the meaning of the Act, but his decision was reversed by a Divisional Court, which referred the actions for trial to the Drainage Referee. Leave to appeal from the orders of the Divisional Court was given by the Court of Appeal (1 O. W. R. 324, 4 O. L. R. 102).

J. H. Moss, for appellants.

G. H. Watson, K.C., and N. Sinclair, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, J.J.A.) was delivered by

OSLER, J.A.—Judges of the County Court and certain specified officers . . . are by sec. 141 (1) of the Judica-

ture Act declared to be official referees for the trial of such questions as shall be directed to be tried by such referees.

The Drainage Referee is not one of these officers.

If other and additional official referees are required, and the President of the High Court so certifies, "the Lieutenant-Governor may from time to time appoint other and additional official referees accordingly:" sec. 141 (2).

The Drainage Referee has not been appointed an official referee under this clause.

A person, therefore, who is not an official referee *ex officio*, i.e., by virtue of and as incidental to the holding of some other office, can become such only by special appointment as official referee, and the only authority for making such appointment seems to be under sec. 141 (2).

By the Arbitration Act, R. S. O. ch. 62, sec. 28, subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or Judge may refer any question arising in any cause or matter for inquiry and report to any official referee or to a special referee agreed on by the parties.

And by sec. 29 in certain specified cases the Court or Judge may refer the whole cause or matter or any question or issue of fact arising therein or any question of account to be tried before a special referee agreed on by the parties or before an official referee.

The reference, therefore, can be made only to a person who is such an officer, or by consent to a special referee agreed on by the parties.

By sec. 88 (1) of the Ontario Drainage Act, R. S. O. ch. 62, the Lieutenant-Governor in Council may from time to time appoint a referee for the purpose of the drainage laws.

The person so appointed shall be deemed to be an officer of the High Court, sec. 88 (2), and he shall hold office by the same tenure as an official referee under the Judicature Act.

The Drainage Referee, therefore, while an officer of the High Court and holding his office by the same tenure as an official referee, is an officer specially appointed for the administration of the drainage laws, and his powers as Drainage Referee are specified and defined in sec. 89, *inter alia*, sub-sec. (1). He shall have the powers of an official referee under the Judicature and Arbitration Acts, and of arbitrator under any former enactments relating to drainage works, and he is substituted for such arbitrator.

If, however, he is not one of those officers who is *ex officio* an official referee under sec. 141 (1) of the Judicature Act, and has not been appointed as such by the Lieutenant-Governor

under sec. 141 (2), I do not see how he can be regarded as an official referee under that Act, merely because he happens to be a different kind of referee and officer of the High Court under another Act, with special powers incidental to the exercise of his jurisdiction under that Act. Rule 12 of the Judicature Act, referred to in the judgment below, which provides that all officers of the High Court shall be auxiliary to one another for the purpose of promoting the convenient and speedy administration of business, does not seem to me to advance the argument in favour of the Drainage Referee being an official referee, because, whatever may be his powers as Drainage Referee, for the purpose of the Drainage Act, the sole question is whether he is an official referee within the meaning of the Judicature Act and Arbitration Act, to whom references may be made in invitum under the latter Act. I cannot agree with the Court below in holding that "an official referee is official only in the sense of being an officer of the Court." He is an official referee by virtue of an appointment to that office, or ex officio as being the holder of another specified office. All official referees are officers of the Court, but it does not follow that all referees who are officers of the Court are official referees. If it did, a special referee would, by virtue of sec. 30 (1) of the Arbitration Act, be an official referee.

Section 8, sub-sec. 22, of the Interpretation Act is also relied upon in the judgment below. I do not think it necessary to quote it, but it can have no application unless the Drainage Referee is ex officio or by appointment an official referee.

Then it is said that sec. 110 of the Drainage Act assumes that the Drainage Referee is an official referee to whom reference may be made under sub-sec. 2 of sec. 29 of the Arbitration Act. The answer to that, again, is, that his status must be found in some appointment direct or ex officio as such. The section (110) is not one dealing with his jurisdiction, but with appeals from his decisions, and (if this part of it is still in force now that sec. 94 of the Act has been repealed by 1 Edw. VII. ch. 30, sec. 5) it may embrace the case of a decision or report of the referee acting as special referee by consent of parties. It goes no further.

The jurisdiction of the Drainage Referee appears to me to be limited to the administration of proceedings under the Drainage Act. The powers conferred upon him are incident to that jurisdiction. The repeal of sec. 94 emphasizes this. As that section stood in the revised statutes there was express authority to refer just such a case as this to him. If, as I

think, he is not an official referee, that power no longer exists. I am therefore of opinion that the order of the Divisional Court is wrong and ought to be reversed and the judgment of Meredith, C.J., restored. Costs follow.

WINCHESTER, MASTER.

DECEMBER 26TH, 1902.

CHAMBERS.

MORRISON v. MITCHELL.

Trade Mark—Infringement—Statement of Claim—Particulars.

Application by defendants for further and better particulars.

C. A. Masten, for defendants.

Grayson Smith, for plaintiffs.

THE MASTER:—The action was brought for the alleged infringement of a trade mark, and by order made on 31st October, 1902, the plaintiffs were directed to furnish particulars of their statement of claim as follows:— (a) of the names and addresses of the persons to whom the defendants had sold goods marked with the trade mark in question; (b) of the acts of infringement; (c) of the character of the trade mark claimed; (d) of the acts of trespass on plaintiffs' goods, rights, and property. The particulars furnished began by stating that the particulars ordered were set forth as fully as practicable in the paper served, in the examinations for discovery, and in the examination of ten witnesses for defendants on commission, all of which were in possession of defendants' solicitors, and proceeded to state in compliance with (a) that these names and addresses appeared in the defendants' books, of which plaintiffs had no personal knowledge and defendants had. This statement is insufficient, in the absence of an affidavit that the particulars ordered are not at present within plaintiffs' knowledge. As to (b) the plaintiffs have furnished so-called particulars wider than the statement of claim, whereas dates and places should have been set out. As to (c) the form and manner of using and applying a fraudulent imitation of plaintiffs' alleged trade mark to secure the benefit of plaintiffs' property and reputation, should be stated. As to (d) the particulars furnished are sufficient.

Order accordingly. Costs to defendants in the cause.

BRITTON, J.

DECEMBER 26TH, 1902.

TRIAL.

MAJOR v. MCGREGOR.

Libel — Post-card — Words of Doubtful Signification — Innuendo — Necessity for Shewing Sense in which Words Understood.

Action for libel tried at Cornwall with a jury. The libel complained of was contained in a post-card sent by defendant to plaintiff through the post, carried home by plaintiff's father, who was unable to read, and by him handed to plaintiff's wife, who read it aloud to plaintiff. No other witness was called, who ever saw, or read, or heard read, the post-card. The plaintiff had told defendant that one Jack Sullivan should pay certain taxes, and defendant wrote to plaintiff on the post-card: "I saw Jack Sullivan this morning and he said make the S. B. pay it." The libel alleged was that the letters "S. B." were intended to convey an offensive epithet reflecting upon plaintiff's parentage.

G. I. Gogo, Cornwall, for plaintiff.

D. B. Maclellan, K.C., for defendant.

BRITTON, J.:—It is doubtful whether if the words suggested in plaintiff's innuendo were written out in full, they would be libellous. They are words of abuse, but are, as often used, absolutely meaningless, no one understanding them to really impute anything against the character of the mother, or as being a statement of a fact. But, even assuming the libellous character of the innuendo, if written in full, there was no libel here, the letters not being actionable in their natural signification, and plaintiff having failed to prove the innuendo, not having shewn that the letters were in fact understood in the sense alleged: *Macdonald v. Mail Printing Co.*, 32 O. R. 168, 169, 2 O. L. R. 278; *Huber v. Crookall*, 10 O. R. 475.

Action dismissed with costs.

DECEMBER 26TH, 1902.

DIVISIONAL COURT.

WALTON v. WELLAND VALE MFG. CO.

Master and Servant—Injury to Servant—Factory—Negligence—Findings of Jury — Finding of Judge — Consent — Notes of Evidence.

Motion by plaintiffs to set aside verdict and judgment for defendants in an action to recover damages for the death of the husband of the adult plaintiff and father of the infant.

plaintiffs, tried before MEREDITH, C.J., and a jury at Hamilton, and for a new trial. The death was caused by injuries received in the defendants' bicycle factory, the deceased being in the employment of defendants as a workman therein. The plaintiffs alleged negligence on the part of defendants. The jury found that defendants were guilty of negligence in not seeing that pulleys of proper size were used for the grindstone, the breaking of which was the cause of the injuries, but also found that deceased had been negligent in not refusing to make use of the insufficient pulley provided by defendants. The trial Judge also made a further finding pursuant to a consent which he understood was given by counsel; and upon the findings dismissed the action.

J. W. Nesbitt, K.C., for plaintiffs.

P. D. Crerar, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.), was delivered by

STREET, J.:—As the notes of evidence do not shew any acceptance by plaintiffs' counsel of the suggestion that the Judge should make further findings, it will be safer to treat the case as depending upon the findings of the jury. The judgment upon the finding as to contributory negligence, read in the light of the evidence and charge, was right. Further, upon the uncontradicted evidence, no right in plaintiffs to recover appeared, and no question remained to leave to the jury. Their finding that defendants were negligent was founded upon a misconception of defendants' duty.

Appeal dismissed with costs.

Moss, C.J.O.

DECEMBER 26TH, 1902.

C.A.—CHAMBERS.

MCDONALD v. SULLIVAN.

Leave to Appeal—Attachment of Debts—Small Amount Involved.

Application by judgment debtors for leave to appeal from order of a Divisional Court, ante 784, reversing order of STREET, J., ante 723, and restoring order of Master in Chambers, ante 721, which made absolute an order of attachment and garnishing summonses.

L. V. McBrady, K.C., for applicants.

W. A. Skeans, for judgment creditor.

Moss, C.J.O.:—No sufficient reasons are shewn for allowing the appeal, the amount in question, exclusive of costs, being only \$152. Justice seems to have been done by the Master's order.

Motion dismissed with costs.

FALCONBRIDGE, C.J.

DECEMBER 27TH, 1902.

TRIAL.

BODWELL v. McNIVEN.

*Specific Performance—Contract for Sale of Land—Part Performance
—Evidence of Acts Constituting.*

Action for specific performance of a contract for the sale and purchase of land.

J. C. Hegler, K.C., and J. H. Hegler, Ingersoll, for plaintiff.

J. M. McEvoy, London, and J. L. Paterson, Ingersoll, for defendant.

FALCONBRIDGE, C.J.:—Possession is part performance both by and against the stranger and the owner: Fry on Specific Performance, 3rd ed., sec. 604. Upon the evidence, the character of the acts done was sufficient to constitute part performance. Usual judgment for plaintiff for specific performance with costs.

MEREDITH, C.J.

DECEMBER 29TH, 1902.

CHAMBERS.

ANTHONY v. BLAIN.

*Pleading—Statement of Claim—Delivery of Amended Pleading—
Time—Necessity for Leave or Consent—Rules 256, 300—Order
Validating Delivery—Terms—Stay of Proceedings—Payment of
Costs.*

Appeal by plaintiff from order of local Judge at Brampton determining that an amended statement of claim delivered by the plaintiff (without leave having been obtained to amend and without defendant's consent) was irregularly delivered, contrary to Rule 300, but allowing the amended statement of claim to stand, and directing plaintiff to deliver particulars of certain paragraphs of it within ten days, and precluding him from giving evidence at the trial in support of the charges in respect of which particulars were ordered, in default of their being delivered as directed by the order, and also directing the plaintiff to pay the costs of the motion, together with the costs of the proceedings rendered unnecessary, and the costs thrown away by reason of plaintiff having delivered the amended statement of claim, extending the time for delivery of the statement of defence until six days after the delivery of the particulars and payment of the costs directed to be paid, and staying the proceedings in the action until the particulars should be delivered and the costs paid.

The action was for criminal conversation, and after delivery of the statement of claim an order for particulars was made and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim, and the order appealed from was made on the motion of defendant to set aside the amended pleading for irregularity.

W. E. Middleton, for plaintiff.

W. R. Riddell, K.C., for defendant.

MEREDITH, C.J.:—I am of opinion that the local Judge correctly interpreted Rule 300, and that the delivery of the amended statement of claim was irregular. The Rule provides that "the plaintiff may, without leave, amend his statement of claim once before the expiration of the time limited for reply and before replying, or, where no defence is delivered, before the expiration of four weeks from the appearance of the defendant who last appears." The first branch of the Rule applies where a statement of defence has been delivered, and gives plaintiff the right to amend without leave within three weeks after defence unless he has delivered his reply. The time for delivering the reply is regulated by Rule 256, and it is to the provisions of that Rule that reference is made in the earlier part of Rule 300; but where no defence is delivered according to the provisions of the Rule, the plaintiff, to be entitled to avail himself of it, must amend his statement of claim within four weeks from the appearance of the defendant who last appears. The language of the Rule is explicit, and there is no escape from the conclusion that it operated to render the amended statement of claim irregular.

The terms imposed as the condition upon which the amended pleading was allowed to stand were, however, too onerous. It was not reasonable to provide that proceedings in the action should be stayed until the costs should be paid. The stay of proceedings in default of payment should have been limited to proceedings on the additional charges introduced into the statement of claim by the amendment, and it would not have been unreasonable to have provided that in case of default in payment of the costs within a named time the amendments should be stricken out. See, as to the question of staying proceedings for non-payment of costs, *Re Wickham*, 35 Ch. D. 272; *Graham v. Sutton Garden Co.*,

[1897] 2 Ch. 367. It was objected by defendant that plaintiff had, by delivering particulars of the amendment statement of claim pursuant to the order appealed against, precluded himself from appealing. This objection is not well founded. Mere compliance with the terms imposed in an order by the party to whom an indulgence is granted on terms, does not preclude him from moving against the order: *Anlaby v. Prætorius*, 20 Q. B. D. 764; *Hewson v. Macdonald*, 32 C. P. 407; *Duffy v. Donovan*, 14 P. R. 159.

Appeal allowed and paragraph 7 of the order to be stricken out, and the following substituted, that until payment of the costs further proceedings on the charges introduced by the amendment be stayed, or, at the defendant's option, that if these costs are not paid within one month after taxation, the amendments be struck out. Costs of appeal to be costs in the cause.

BRITTON, J.

DECEMBER 29TH, 1902.

WEEKLY COURT.

KING v. CITY OF TORONTO.

Municipal Corporation—Power of Council to Submit Question to Electors—Proposed Expenditure of Money for Sanitarium—Intention to Apply to Legislature—Vague and Unsatisfactory Question—Injunction.

Motion by plaintiff to continue an injunction restraining defendants from submitting, at the annual municipal election on the 5th January, 1903, to the electors of the city of Toronto qualified to vote on money by-laws, the question: "Are you in favour of the city contributing \$50,000 towards the establishment of a sanitarium for the treatment of residents of Toronto suffering from consumption?"

W. Nesbitt, K.C., and J. H. Denton, for plaintiff.

J. S. Fullerton, K.C., and W. C. Chisholm, for defendants.

BRITTON, J.:—There is nothing in the Municipal Act permitting the council to take a plebiscite, and there is no express prohibition against its doing so. If any advantage to the citizens at large could accrue from such answers as the electors may choose to give, the Court would be slow to interfere at this stage. The ballots have been printed, and, as there is to be a vote taken on a money by-law, very little, if

any, additional expense will be incurred. On the other hand, no actual harm will result from allowing the questions to be answered. The avowed purpose is to inform the Legislature of the result, and, if the answers are favourable, to use the result as an argument in attempting to obtain for the city the power, which it has not at present, of making the contribution of \$50,000, without submitting a by-law to the people. Many electors may be in favour of such a contribution upon definite conditions. The answers, to be of any value, would have to be made to several further questions, e.g., "Where is the sanitarium to be erected?" "At what cost?" "Is the sanitarium to be established by an individual or a company?" "Is the \$50,000 to be given in aid of such an institution when established, or is the sanitarium to be established by the city alone?" It will be time enough to answer the question when a carefully prepared by-law is submitted giving all necessary information and safe-guarding the grant. *Helm v. Town of Port Hope*, 22 Gr. 273, followed. *Davis v. City of Toronto*, 15 O. R. 33, distinguished. *Darby v. City of Toronto*, 17 O. R. 561, referred to.

Injunction continued till the trial. If plaintiff does not seek in the action any other relief, the motion may be turned into a motion for judgment, and judgment will be for plaintiff for a final injunction with costs.

FALCONBRIDGE, C.J.

DECEMBER 29TH, 1902.

TRIAL.

MATHEWS v. MATHEWS.

Partition—Expensive Proceedings—Leave to Proceed with Previous Action—Terms.

Action for partition, tried at Sandwich.

A. H. Clarke, K.C., for plaintiff and certain defendants.

D. R. Davis, Amherstburg, and F. H. A. Davis, Amherstburg, for the other defendants.

FALCONBRIDGE, C.J.:—The defendant Mary Mathews has not established her claim to the land by length of possession. But there are many other questions involved, and these expensive proceedings might easily have been avoided, there having been very little in dispute between the parties when the proceedings were initiated. On payment by plaintiff to

defendant Mary Mathews of two-thirds of her solicitor's bill in the former action (as per agreement), plaintiff will be entitled to go on with the proceedings for partition in the Master's office as from the 27th June, 1901, when the Master made his report or memorandum. Plaintiff may have this bill taxed at his own expense. No costs of this action.

OSLER, J.A.

DECEMBER 29TH, 1902.

C. A.—CHAMBERS.

BENTLEY v. MURPHY.

Leave to Appeal — Appeal as of Right on One Branch — Amount Involved—Divergence of Judicial Opinion.

Motion by plaintiffs for leave to appeal from order of a Divisional Court (ante 726) varying the judgment of BRITTON, J., (ante 273). The result of the order of the Divisional Court was that on the defendant Craig's appeal the judgment at the trial was reversed, and the action dismissed as against him altogether, and that on the plaintiffs' appeal the judgment refusing specific performance was affirmed, though on a different ground from that on which it was rested by the trial Judge.

L. G. McCarthy, K.C., for plaintiffs.

J. J. Foy, K.C., and T. Mulvey, K.C., for defendants.

OSLER, J.A.:—The plaintiffs need no leave to appeal from the order of the Divisional Court on the defendant Craig's appeal, and varying the judgment against the defendant Murphy, and this being so, and the subject matter of the action being a piece of property of the value of at least \$5,000, and considering the great divergence of judicial opinion in respect of the rights of the parties, and the way in which the ultimate judgment has been arrived at, the plaintiffs should have leave to appeal from the order dismissing their own appeal to the Divisional Court. This is a stronger case for granting leave than was made in *Kidd v. Harris*, 3 O. L. R. 277. Collateral objections, such as delay in the conduct of the action, are irrelevant. The plaintiffs must give security in \$400 for the costs of the appeal. Motion to quash appeal refused. Costs of all to be costs in the cause.

BRITTON, J.

DECEMBER 30TH, 1902.

TRIAL.

GROSSMAN v. CANADA CYCLE CO.

Copyright—Newspaper Printed in United States—Copyright in England—Application of Imperial Statutes—"First Publication."

Action for damages for the infringement of the alleged copyright of plaintiffs in a journal called the "Cycling Gazette," and in an article intituled "The Boosters' Club" published in that gazette. The article was written for plaintiffs by one Charles W. Mears, was paid for by them, and was published by them at Cleveland, Ohio, in the issue of the Cycling Gazette dated 18th October, 1900. On the first page of that issue was printed the following notice: "Copyright applied for, 1900, by Emil Grossman and Bro. All rights reserved." The plaintiffs claimed copyright, and alleged that on 29th August, 1901, their copyright in the Cycling Gazette and in its issue of 18th October, 1900, and in the article referred to, were duly registered at Stationers' Hall, pursuant to 5 & 6 Vict. ch. 45 (Imp.). This registration was for the purpose of bringing the present action, as required by sec. 24 of that Act. At the time of registration the Cycling Gazette was published at New York. The defendants published the article in question on the 23rd March, 1901, at Toronto, in a paper called "The Assistant Manager"—a paper not issued regularly, but only to the trade and to agents in England. The defendants denied the registration of the alleged copyright, denied that the article was subject to copyright as against defendants, and said that, as plaintiffs were not British subjects, and as they resided outside the British dominions, the Imperial Act did not confer any copyright upon them. They further said that "The Assistant Manager" was issued gratis, and that in good faith this article was published therein; that its publication ceased in the spring of 1901; that plaintiffs sustained no damage by defendants' publication; but, to cover any technical infringement, and without admitting any liability, they paid \$1 into Court.

C. D. Scott, for plaintiffs.

E. B. Ryckman and C. W. Kerr, for defendants.

BRITTON, J.:—If plaintiffs' journal comes under the definition of "book" in 5 & 6 Vict. ch. 45, sec. 2, the plaintiffs are out of Court because of the enactment of 7 Vict. ch.

12, secs. 19, 20, which restricts copyright in any book first published outside of Her Majesty's dominions to such right as a person may have become entitled to under the last mentioned Act. The plaintiffs have brought their action on the assumption that 7 Vict. ch. 12 does not apply, and they seek to recover under 5 & 6 Vict. ch. 45. The "Cycling Gazette" is within the wording of secs. 18 and 19 of the last mentioned Act. Section 24 does not apply to cases within secs. 18 and 19, so any objection to form or particulars of registration at Stationers' Hall is not open to defendants: *Mayhew v. Maxwell*, 1 J. & H. 312; *Cox v. L. & W. Co.*, L. R. 9 Eq. 324. If sec. 24 does not apply to cases within secs. 18 and 19, then sec. 16 does not, so the statement of defence is sufficient to let in any matter of defence disclosed by the evidence: *Coote v. Judd*, 23 Ch. D. 727. To entitle plaintiffs to British copyright, there must be "first publication" of the paper containing the article in question, in the United Kingdom. This plaintiffs have failed to establish. It is not in dispute that the plaintiffs' paper containing the article in question was actually printed and published in Cleveland, Ohio, on the 18th October, 1900. The only publication by plaintiffs in the United Kingdom was by posting numbers to subscribers in England, and particularly by posting to the plaintiffs' agent in London, England. Even if it be assumed that persons in England received the paper in due course of post, subscribers in the United States would be in possession of their copies days in advance. This is not a question of how far, as a matter of contract or for any purpose, the post office department of one country can be considered the agent for persons in another country to whom papers are addressed; it is purely a question of "first publication in England," or at least simultaneous publication in England and the United States. A paper printed and published in the United States and posted there to subscribers both in that country and in England cannot be held to be first published in England.

Judgment for defendants.

FALCONBRIDGE, C.J.

DECEMBER 30TH, 1902.

TRIAL.

CHEVALIER v. TREPANNIER.

Title to Land—Declaration — Pleading — Possession — Statute of Limitations—Tenancy by the Curtesy—Devolution of Estates Act—Improvements.

Action by the purchaser of the interests of six of the eleven children of a deceased intestate, owner of certain lands

in the township of Tilbury North, for a declaration that plaintiff is entitled to possession of the lands in common with other persons entitled, and for mesne profits. Defendant, husband of deceased intestate owner, alleged that he took possession of the land in 1856, and shortly after his marriage to deceased, when it was wild land, and improved it permanently, and that he (being an illiterate man) had the indenture under which plaintiff claims explained to the effect that he (defendant) was to be the grantee thereunder, and that he has always so believed, until recently. Defendant claimed at all events as tenant by the curtesy, but if otherwise determined then a lien on the lands to the extent that the value thereof has been enhanced by his improvements.

A. H. Clarke, K.C., for plaintiff.

Solomon White, Windsor, for defendant.

FALCONBRIDGE, C.J.:—The defendant has not pleaded the Real Property Limitation Act, and should not now be allowed to do so, even if it could avail him, against his deceased wife and his children, one of whom only became of age in 1899. He did not elect under the Devolution of Estates Act, sec. 4 (3), within six months after his wife's death, to take an interest as tenant by the curtesy, and so he is bound to take his distributive share. Defendant's claim for improvements may properly come to be considered when partition is sought by any of the persons entitled. This action is now practically one for the declaration of the rights of the parties thereto as between themselves, and as plaintiff, by his statement of claim and the prayer thereof, recognized no right at all of defendant, and as defendant claimed the whole property, it is not a case for costs. Defendant will be declared to be as against plaintiff entitled under sec. 5 of the Devolution of Estates Act to one-third of the property. The children are entitled to the remaining two-thirds, and plaintiff claims to be entitled to eight shares out of eleven, or eight-elevenths of the residue, but there can be no declaration as to this except as between plaintiff and defendant, because the persons whose interests plaintiff says he has acquired and the other heirs are not parties. By sec. 13 of the Act, the real estate seems to have been vested in the heirs of defendant's wife since December, 1892, being twelve months after the death of the intestate.

MEREDITH, J.

DECEMBER 31ST, 1902.

CHAMBERS.

RE PAGE.

Will—Construction—Fund for Payment of Debts, Funeral, and Testamentary Expenses—Specific Legacies.

Motion by executors of will of James Page, under Rule 938, for an order determining out of what fund mentioned in the will should be paid the debts, funeral, testamentary, and other expenses connected with the administration of the estate of the testator and incidental thereto. The proper determination of the question raised depended upon whether the gifts comprised in the 9th clause of the will were specific. It was admitted that the other gifts were specific, and that those of personalty exhausted the whole of that part of the estate. Clause 9 was in part as follows: "I give, devise, and bequeath unto my executors hereinafter named all the rest and residue of my real estate upon trust to permit my said wife to collect, use, and enjoy the rents arising therefrom for her own use for the period of one year from my decease, and until sales thereof shall be made as hereinafter specified, and at the expiration of one year from my decease or at the death of my wife, whichever event shall first happen, upon the further trust to sell and absolutely dispose of the same as soon as a fair price . . . can be obtained therefor, and out of the proceeds thereof I give and bequeath the following sums which I direct my executors . . . to pay over in the order in which the same are hereinafter named to the following institutions or charities. . . . After payment of said sums . . . I give and bequeath the balance remaining out of the proceeds of said sales . . . to be equally divided among . . . the children of my sister."

W. T. Evans, Hamilton, for executors and widow.

F. W. Harcourt, for infants.

E. F. Lazier, Hamilton, for Methodist societies interested under the will.

George S. Kerr, Hamilton, for other charities.

W. A. Logie, Hamilton, for other legatees.

MEREDITH, J.:—All gifts of real estate, including a residue, are necessarily specific; but in this case the land is not given to the beneficiaries, but to the executors to be sold

by them, and it is only out of the proceeds that certain legacies are to be paid, etc. These gifts are not specific. Page v. Leapingwell, 18 Ves. 463, and cases following it, distinguished. The debts and funeral and testamentary expenses should be paid out of the residue of the proceeds of the sale of the lands provided for in clause 9, which is really the residue of the testator's whole estate. The cases do not require that these debts and expenses shall be considered, in all the circumstances of the case, as charged upon and payable out of all the real estate given to the executors: Bailey v. Bailey, 12 Ch. D. 268; In re Tanqueray-Williams and Landau, 20 Ch. D. 476. The testator's intentions to be gathered from the whole will are in accord with these conclusions. The declaration affects debts and funeral and testamentary expenses only, not any expenses of the execution of the trusts of the will not comprised in the term "debts and funeral and testamentary expenses." Costs of all parties, those of the executors as between solicitor and client, to be paid out of the same residue.

Ex. A. M.



